No. 150

IN THE

Supreme Court of the United States

October Term, 1948

J. W. KIRKLAND, H. H. GARRISON, *et al.*,

Petitioners,

—VS.—

ATLANTIC COAST LINE RAILROAD COMPANY, A VIRGINIA CORPORATION, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, NATIONAL MEDIATION BOARD, AND FRANK P. DOUGLASS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

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July 9, 1948

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To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, H. H. Garrison, *et al.*, respectfully submit this petition for a writ of certiorari to review the judgment (R. 19) of the United States Court of Appeals for the District of Columbia entered and filed in that Court on April 19, 1948, in the case of *J. W. Kirkland, et al.* v. *Atlantic Coast Line Railroad Company, et al.*, Docket 9636, 167 F. (2d) 529 (App. D. C. 1948).

The Court of Appeals has affirmed the judgment of the United States District Court for the District of Columbia (R. 16), dated June 12, 1947, dismissing the petitioners'

complaint, and it has held that the District Court lacked jurisdiction to review a determination of law made by the National Mediation Board (R. 7, 8) whereby that agency held that it had no discretion to grant the relief sought by petitioners as hereinafter described.

Statement of the Case

This case arises out of the refusal by the National Mediation Board (hereinafter sometimes referred to as "the Board") to exercise its discretion under the Railway Labor Act (45 U. S. C. § 151 *et seq.*) to determine whether a carrier-wide or less-than-carrier-wide craft or class should be recognized for collective bargaining purposes on the Western Division of the properties of the Atlantic Coast Line Railroad Company (hereinafter sometimes referred to as "the A. C. L."). The Board held (erroneously as petitioners believe and as the Court of Appeals tacitly assumed for purposes of its decision) that it was required by law to designate a carrier-wide craft or class and therefore could not designate a smaller unit even though such smaller unit might be more appropriate and more in keeping with the purposes of the Railway Labor Act. The underlying facts of this case are as follows:

Petitioners, a large majority of the locomotive engineers employed by the A. C. L. on the section of its system known as the Western Division, filed their complaint in the District Court for declaratory judgment against the A. C. L., the Brotherhood of Locomotive Engineers (hereinafter called "the B. L. E."), the National Mediation Board and Frank P. Douglass, Chairman of the Board (R. 2).

Prior to January 1, 1946, the railroad property now constituting the Western Division of the A. C. L. was an independent railroad entity. It was owned by the Atlanta, Birmingham and Atlantic Railway Company, until in 1926 the Atlanta, Birmingham and Coast Railroad Company was organized to acquire its properties and conduct its opera-

tions. This transfer and the acquisition of all the latter's common stock by the A. C. L. was approved by the Interstate Commerce Commission, and from 1926 to 1946 the subsidiary company conducted operations as a separate and distinct carrier, except that certain of its officers and managing personnel were similarly related to the A. C. L. (R. 3-4).

As of January 1, 1946, the A. C. L. acquired the properties and franchises of the Atlanta, Birmingham and Coast Railroad Company and has since operated them as its Western Division. The management, personnel and operating methods remain substantially the same as prior to 1946, and neither personnel nor operations have been mingled or confused as a result of the transfer (R. 4).

For more than 35 years the engineers on the property now constituting the Western Division have been a separate craft or class of employees. They were organized as such, and for this period they have bargained collectively and entered into employment contracts through representatives of their own selection. From 1940 until the occurrence of the events complained of, the said engineers were represented by the Brotherhood of Locomotive Firemen and Enginemen (R. 5, 7).

In April 1946, although the approximately 95 engineers on the Western Division were satisfied with their representation, and the engineers on the rest of the A. C. L. system, approximately 913 in number, who were represented by the B. L. E., were likewise satisfied with their representation, the latter organization submitted to the Board certain authorization cards which had been signed by more than half of the engineers on the A. C. L. proper, but which had not been circulated among or signed by the engineers on the Western Division, and alleged that a representation dispute existed. The B. L. E. requested the Board to investigate the dispute and certify the representative of all the engineers on the A. C. L., including the Western Division (R. 6).

The Board, proceeding upon a construction of the Railway Labor Act (which the petitioners contend was erroneous) to the effect that under Section 2, Ninth, 45 U. S. C. § 152, crafts or classes must as a matter of law, for collective bargaining purposes, be carrier-wide crafts or classes, conducted an election, the result of which, by reason of the relative numbers of engineers involved (913 on the A. C. L. proper, as against only 95 on the Western Division), was a foregone conclusion, and, although the petitioners voted to reject the respondent B. L. E., certified the B. L. E. as the representative of all the engineers on the A. C. L., including the Western Division (R. 7).

The petitioners, as a large majority of the engineers on the Western Division, plead (R. 8-9) that the Board's erroneous construction of the Act and its other action, as indicated, if permitted to take effect, would result in irreparable injury to the petitioners through:

(1) depriving the petitioners of their right to organize and bargain collectively through representatives of their own choosing, as guaranteed by Section 2, Fourth, of the Railway Labor Act;

(2) depriving the petitioners of the right to have an effective voice and vote in the determination of their wages, hours, rules and the conditions of their employment, as guaranteed by the Act; and

(3) destroying and vitiating petitioners' valuable seniority rights and other valuable existing contractual and property rights (acquired through many years of collective bargaining and outlined in a contract which the Brotherhood of Locomotive Engineers is believed to be attempting to modify and destroy) without due process of law, and contrary to the Act.

It should be emphasized that petitioners did not ask the trial Court to control the Board's discretion in any way. The Court was not asked to order the Board to withdraw its certification of the B. L. E., to establish a separate class

or craft embracing only the engineers on the Western Division of the A. C. L., or to take any other action to influence the Board's decision on the merits. The Court was asked simply to inform the Board that it has the legal power and discretion, under the Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action. Petitioners are confident that if the Board is freed of its self-imposed inhibition against the exercise of its statutory discretion in this respect, it will voluntarily correct the erroneous certification involved in this case (R. 10). Petitioners contend that they are entitled to have the Board act in the matter of certification free of any misapprehension that the Board is without discretion in making its decision.

Motions to dismiss petitioners' complaint (R. 14, 15) were filed by the B. L. E., the Board and Frank P. Douglass. The A. C. L. did not join in those motions, but filed an answer (R. 11-13).

These motions were granted by the District Court without opinion (R. 16).

On appeal, the United States Court of Appeals for the District of Columbia affirmed (R. 17-19) the District Court's judgment, solely on the ground that, in its opinion, the Court lacked jurisdiction to review the determination of law made by the Board in limiting its discretion even though that determination might be wrong. The Court of Appeals held that the Administrative Procedure Act (5 U. S. C. § 1001 *et seq.*) did not confer jurisdiction on the Courts to review erroneous interpretations of the Railway Labor Act by the National Mediation Board.

Jurisdiction

The District Court had jurisdiction under District of Columbia Code (1940) §§ 11-301, 11-305, and 11-306, and 28 U. S. C. § 41 (8), the Railway Labor Act, as amended, the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.*, and the Federal Declaratory Judgment Act, 28 U. S.

C. § 400 *et seq.* Review by the Court of Appeals is authorized by D. C. Code (1940) § 17-101.

The jurisdiction of the Supreme Court of the United States is supported by Section 240 of the Judicial Code (28 U. S. C. § 347).

The judgment of the Court of Appeals was filed April 19, 1948; and this petition is being filed on or before July 19, 1948.

The statutory provisions involved in this case are set out at length in the Appendix to this petition and brief.

The Questions Presented

In view of the fact that the Court of Appeals limited its decision to the question of the Court's jurisdiction to review the Mediation Board's interpretation of the Railway Labor Act as restricting its discretion, and did not question petitioners' position that such interpretation was erroneous and contrary to the purposes of the Railway Labor Act, only the following question is presented in this petition for certiorari:

> Whether the District Court, by reason of the Administrative Procedure Act, has jurisdiction to review erroneous interpretations of the Railway Labor Act by the National Mediation Board where such interpretations result in improper limitations on the Board's statutory discretion and defeat the purposes of the Railway Labor Act.

Reasons for Allowance of Writ of Certiorari

(1) *The decision of the Court of Appeals involves questions of general importance and the construction of United States statutes (the Administrative Procedure Act and the Railway Labor Act) which have not been, but should be, settled by the Supreme Court.*

The Supreme Court has long recognized that the purpose of the Railway Labor Act (to be enforced judicially when-

ever necessary) is to insure employees who are subject to that Act the rights to select their own collective bargaining representative and to have the employer "treat with" that representative and with no other. *Texas & N. O. R. R.* v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930); *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515 (1937).

Despite the recognition of that purpose and the judicial enforceability thereof, the Supreme Court in 1943 declined to "infer" a provision for judicial review with respect to an interpretation of the Railway Labor Act by the National Mediation Board under which the Board held that it had no discretion to designate a collective bargaining representative for a bargaining unit of less-than-carrier-wide scope. *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943). That holding of the Supreme Court was based on the absence of an express statutory provision for review and the "inference . . . from the history of the Act" that the omission of such a provision was not inadvertent.

Since the *Switchmen's Union* decision, the Supreme Court has indicated that it will grant judicial review in some situations under the Railway Labor Act (even though there is no express provision for review) where necessary to prevent frustration of the purposes of that act. *Elgin, J. & E. Ry.* v. *Burley,* 325 U. S. 711 (1945), 327 U. S. 661 (1946); *Order of Railway Conductors* v. *Swan,* 329 U. S. 520 (1947).

In 1946 Congress passed the Administrative Procedure Act, which was stated by the Congressional sponsors to be for the purpose of:

(1) providing "judicial review for the redress of any legal wrong" (Senate Document 248,* p. 192);

(2) authorizing *courts* rather than *agencies* to decide all

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* The publication which will be cited in this manner throughout this petition and the annexed brief is ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, SENATE DOCUMENT NO. 248, 79th Congress, Second Session, 1946.

questions of law "in the last analysis" (Senate Document 248, p. 214);

(3) providing review where "there is no statutory method now in effect for review of a decision of an agency" (Senate Document 248, p. 325);

(4) allowing "persons who are aggrieved as a result of acts of governmental agencies to appeal to the courts" (Senate Document 248, p. 318);

(5) "remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs" in cases where "no redress or no review was granted, solely because the statute did not provide for a review" (Senate Document 248, p. 311).

The effect of the Administrative Procedure Act was to insert in the Railway Labor Act (and all other statutes, except those which "preclude judicial review" in clear and convincing language) an express provision for judicial review.

Congress made it clear that it did not deem judicial review to be "precluded" by the Railway Labor Act as interpreted in the *Switchmen's Union* decision. The sponsors of the Act stated that "statutes preclude judicial review" within the meaning of the Section 10 exception only when a statute *"upon its face"* gives *"clear and convincing* evidence of an intent to withhold it" (Senate Document 248, p. 275; italics supplied). It was further stated without contradiction that "The mere fact that Congress has not expressly provided for judicial review would be completely immaterial" (Senate Document 248, p. 368). Thus the major premise of the *Switchmen's Union* decision was eliminated by the Administrative Procedure Act.

It was asserted on the floor of the House that under the Administrative Procedure Act *no agency* would be excluded from judicial review (Senate Document 248, p. 380), and one Congressman asserted that only one agency (evidently the Administrator of Veteran's Affairs) would be excluded (Senate Document 248, p. 380).

Reference was made on the floor of the Senate to the *Switchmen's Union* decision and two other decisions in which review was denied by the courts, and the author of the Administrative Procedure Act stated that the purpose was to remedy the "defect" revealed in those decisions and to provide review in those situations (Senate Document 248, p. 311).

The reasoning of the *Switchmen's Union* decision, as stated in a different opinion, was referred to on the floor of the House, and the sponsor of the Act there stated that such reasoning would no longer be applicable (Senate Document 248, p. 368).

Congress specifically declined to except certifications of employee representatives from the judicial review provisions of the Act (Senate Document 248, p. 38).

These and other indications of Congressional intent, which are explained and discussed fully in the brief accompanying this petition, show clearly that the Administrative Procedure Act provides judicial review in this case even though in the absence of that Act review might not have been available because of the *Switchmen's Union* decision.

Petitioners have alleged, and firmly believe, that their fundamental rights under the Railway Labor Act would be defeated if the Mediation Board's erroneous interpretation of that Act, and its consequent refusal to exercise its statutory discretion, were permitted to stand. Petitioners allege that they have been placed in an inappropriate bargaining unit, and as a result of being placed in such unit they have been effectively denied their right to choose their own representative and bargain with their employer through that representative.

As indicated above, it is the purpose of the Administrative Procedure Act to authorize the Courts to decide questions of law of this type "in the last analysis", and not to permit erroneous interpretations by administrative agencies to defeat the Congressional purpose as set out in the

Railway Labor Act. Accordingly, it is strongly urged that the Supreme Court grant certiorari in this case in order to declare the availability of judicial review with respect to the erroneous interpretation of the Railway Labor Act by the Mediation Board.

2. *The decision of the Court of Appeals directly conflicts with the decision of the Circuit Court of Appeals in United States ex rel. Trinler* v. *Carusi,* 166 F. (2d) 457 (C. C. A. 3d, 1948), *and the Supreme Court should grant certiorari in order to resolve the conflict.*

The decision of the Court of Appeals in this case is based on the premise that the *Switchmen's Union* decision amounts to a statutory "preclusion" of judicial review, despite the fact that, as indicated above, the *Switchmen's Union* decision was based on assumptions and factors which the Administrative Procedure Act now makes "wholly immaterial" and unavailable for judicial consideration in ascertaining Congressional intent as to review.

In the *Trinler* case, the Circuit Court held that previous court decisions denying review in the absence of an express statutory authorization did not mean that review is "precluded" by statute.

The decision of the Court of Appeals holds that the law with respect to availability of judicial review in a case such as this is not changed by the Administrative Procedure Act, while the Circuit Court in the *Trinler* case holds that Congress made "new law", granting direct review where not previously available.

In the *Trinler* case, the Circuit Court held that the previous availability of a limited form of review in habeas corpus proceedings helps to demonstrate that review is not "precluded"; whereas the Court of Appeals in this case failed to take into similar account the fact that judicial review of Mediation Board certifications has been available in a limited form (and an ineffective form, so far as peti-

tioners are concerned) in enforcement proceedings under the Railway Labor Act (*Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515, 559-562 (1937); *Switchmen's Union* v. *National Mediation Board, supra,* 320 U. S. at p. 307).

The decision in the *Trinler* case has been followed by at least one Federal District Court. *United States ex rel. Cammarata* v. *Miller,* F. Supp. (S. D. N. Y. 1948). Other courts have indicated agreement with the philosophy of that decision. *Snyder* v. *Buck,* 75 F. Supp. 902, 908 (D. D. C. 1948); *Lincoln Electric Company* v. *Commissioner,* 162 F. (2d) 379, 382 (C. C. A. 6th, 1947); *United States ex rel. Lindenau* v. *Watkins,* 73 F. Supp. 216, 219 (S. D. N. Y. 1947); *Ohio Power Company* v. *National Labor Relations Board,* 164 F. (2d) 275 (C. C. A. 6th, 1947). One or two courts have expressed somewhat the same views as those of the Court of Appeals in this case. *Olin Industries* v. *National Labor Relations Board,* 72 F. Supp. 225 (D. Mass. 1947).

In order to resolve the conflict and to prevent confusion, the Supreme Court should grant certiorari in this case and determine the question here presented.

CONCLUSION

From the foregoing it is apparent that the question raised by the decision of the Court of Appeals is of general importance, relating to the construction and application of statutes of the United States, and that such question has not been, but should be, settled by the Supreme Court. It is further clear that there is a conflict between the decision of the Court of Appeals in this case and the decision of the Circuit Court in the *Trinler* case involving the same question, and that such conflict should be resolved by the Supreme Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari issue under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and the proceedings of the Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that the judgment herein of said Court of Appeals be reversed by this Honorable Court, and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

The Decision Below

The opinion of the United States Court of Appeals for the District of Columbia supporting the judgment with respect to which review is sought here is reported in 167 F. (2d) 529, and is set forth in full in the printed record (R. 17-18).

The Court of Appeals affirmed a judgment of the District Court of the United States for the District of Columbia (R. 16) dismissing the complaint of the petitioners, who are 76 of the approximately 95 locomotive engineers on the Western Division of the Atlantic Coast Line Railroad. That

complaint sought a declaratory judgment to correct the National Mediation Board's interpretation of the Railway Labor Act (45 U. S. C. § 151 *et seq.*) as giving the Board no discretion to designate a less-than-carrier-wide craft or class for collective bargaining purposes. The effect of the Mediation Board's interpretation of the statute would be to destroy arbitrarily a long-standing craft or class (created and existing for over thirty-five years during the time that the present Western Division was owned and operated by an independent company) and to destroy employment contracts, seniority and bargaining rights of the petitioners—all without a finding by the Mediation Board that the broad remedial purposes of the Railway Labor Act would be furthered by such destruction. The complaint sought a judicial interpretation of the Railway Labor Act, informing the Mediation Board that it has *discretion* to designate a less-than-carrier-wide craft or class if the facts of the case warrant such designation.

The decision of the Court of Appeals held that, despite the passage of the Administrative Procedure Act (5 U. S. C. § 1001 *et seq.*) in 1946 (which Act was described by its sponsors in Congress as being designed to provide judicial review with respect to "every legal wrong"—see following discussion in this brief), the courts do not have jurisdiction to review and correct erroneous interpretations of law by the National Mediation Board. That decision is based on the assumption that the premises on which *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943)—which denied judicial review in a somewhat similar case—was decided were not changed by the Administrative Procedure Act, although, as will be demonstrated hereinafter, Congress expressed both the general and the specific intent to alter those premises and to provide judicial review in this type of case.

Grounds for Writ of Certiorari

The grounds for seeking writ of certiorari are set forth in the annexed petition.

Statutory Provisions

The applicable statutory provisions are quoted in the Appendix to this petition and brief.

Statement of the Case

The facts material to the consideration of the petition for writ of certiorari are set forth in full in the annexed petition, and will not be repeated here.

Error to Be Urged

It is urged that the Court of Appeals erred in holding that, despite the passage of the Administrative Procedure Act since the decision in *Switchmen's Union* v. *National Mediation Board, supra,* no judicial review is available with respect to an error of statutory interpretation by the National Mediation Board whereby that Board is inhibited from exercising its discretion as to the appropriate craft or class for collective bargaining purposes under the Railway Labor Act.

Summary of Argument

I. The National Mediation Board's action in placing petitioners in a carrier-wide craft or class would result in destroying a smaller collective bargaining unit which has existed for over thirty-five years, and consequently in destroying the rights of petitioners to bargain with their employer through a representative of their own choosing and to have the employer treat with that representative and with no other. These are rights which have long been recognized as entitled to judicial protection. The error in the Board's statutory interpretation was not discussed by the

Court of Appeals, but it is clearly apparent from indications in the statutory language itself and in the legislative history of the Railway Labor Act. Unless petitioners can obtain a ruling in this case which will free the Mediation Board from the erroneously self-imposed inhibition on its discretion, petitioners have no remedy, since the decision as to whether there should be an "enforcement proceeding", in which the Mediation Board's certification might be reviewed, would be entirely within the control of the employer and the Mediation Board, and there probably would be no such proceeding.

II. While the Railway Labor Act as originally enacted did not specifically provide for judicial review, it does not "preclude" it within the meaning of Section 10 of the Administrative Procedure Act. The decision in *Switchmen's Union* v. *National Mediation Board, supra,* does not find a statutory "preclusion" of review, but simply declines to "infer" or supply review in the absence of an express provision therefor. The Administrative Procedure Act removes the basic premises of the *Switchmen's Union* decision by specifically providing for review where not previously available, by providing that mere failure of Congress in any statute to insert an express provision for review is no evidence of intent to "preclude" review, by prohibiting the courts from finding "preclusion" of review from indications beyond the "face" of the statute itself, and by explicit indications of Congressional intent that judicial review be made available in precisely this type of case. Eminent authority, and the remedial purpose of the Administrative Procedure Act, support the conclusion that judicial review is now available in this type of case.

III. There is a conflict between the decision of the Court of Appeals in this case and the decision of the Circuit Court of Appeals in *United States ex rel. Trinler* v. *Carusi,* 166 F. (2d) 457 (C. C. A. 3d, 1948). Whereas the Court of

Appeals held that the Administrative Procedure Act did not extend the availability of judicial review to situations with respect to which courts previously had denied review, the Circuit Court in the *Trinler* case held review now to be available under the Administrative Procedure Act despite former decisions denying review in the type of case there involved. Whereas the Court of Appeals held that the Administrative Procedure Act did not change the law with respect to availability of judicial review, the Circuit Court held that Congress made "new law" in this respect. Whereas the Circuit Court in the *Trinler* case held that the previous existence of a limited form of judicial review (habeas corpus) indicated that review was not "precluded", the Court of Appeals in this case did not give similar effect to a preexisting limited form of review (in enforcement proceedings) with respect to employee representative certifications. The Supreme Court should grant certiorari in order to resolve the conflict between the decision of the Court of Appeals in this case and the decision of the Circuit Court in the *Trinler* case.

ARGUMENT

I. *Declaratory Relief Is Necessary in Order to Protect Petitioners' Rights Under the Railway Labor Act to Select Their Own Bargaining Representative and to Bargain Collectively Through Such Representative.*

This case was decided by the Court of Appeals solely on the ground that the Court lacked jurisdiction to review the Board's interpretation of the Railway Labor Act even though that interpretation might be erroneous and might defeat the purposes of the Act. In view of that determination by the Court of Appeals, it appears inappropriate to present to this Court in detail the many reasons presented to the Court of Appeals showing that the Board's interpretation was wrong and resulted in a frustration of the purposes of the Railway Labor Act. It is assumed that this Court will not wish to rule on that question without first having a ruling thereon by the Court of Appeals.

Before the District Court and the Court of Appeals it was urged by the respondents that the Mediation Board has no discretion in the choice of collective bargaining units, but must in all cases designate a carrier-wide unit, irrespective of the desirability of a smaller unit in some cases to carry out the purposes of the Act. Respondents relied on the split (2-1) decision of the Court of Appeals in *Switchmen's Union v. National Mediation Board,* 77 App. D. C. 264, 135 F. (2d) 785 (1943).

Petitioners called the attention of the lower courts to various statutory indications of Congressional intent which evidently were not brought to the attention of the Court of Appeals in the *Switchmen's Union* case. Petitioners urged that such indications, together with the persuasive reasoning of Mr. Justice Rutledge in the *Switchmen's Union* case, required a finding that the Board had full discretion to designate a less-than-carrier-wide craft or class in any case

(such as petitioners firmly believe this case to be) where such a smaller craft or class is appropriate.

Petitioners urged that the legislative history of the Railway Labor Act clearly shows a Congressional intention that the Board should not be restricted in any manner, geographical or otherwise, in its choice of a bargaining unit. In addition to the indications contained in the legislative history, there are clear indications in the language of the Railway Labor Act to demonstrate that Congress intended that in some cases, at least, less-than-carrier-wide units should be established by the Board. Such intention appears from the following:

(1) The failure of Congress to define "craft or class" in the Railway Labor Act, which indicates an intent (strongly supported by the legislative history) that the Mediation Board shall have complete discretion in each case to determine the appropriate bargaining unit.

(2) The express provision in the Act (Section 1, Fifth) that "the *jurisdiction* or powers of . . . employee organizations [shall not] be regarded as *in any way* limited or defined by the provisions of this Act. . ." (Italics supplied).

(3) The express delegation to the Mediation Board (Section 2, Ninth) of the unrestricted power to "designate who may participate in the election" to determine the bargaining representative of the employees in a craft or class.

(4) The use in the Act of the words "craft" and "class" in conjunction with the words "contracts" and "agreements" in such a way as to make it clear that the many less-than-carrier-wide organizations (recognized in agreements) which were in existence at the time the Act became effective were considered by Congress to be "crafts or classes".

(5) The use throughout the Act (Section 5, First; Section 3, First (i); Section 203; Section 204) of the elastic word "group" (which could have no geographical connotations) as synonymous with "craft or class".

These indications, which were discussed fully before the District Court and the Court of Appeals and were supported by citations to the legislative history of the Railway Labor Act, make it abundantly clear that Congress intended the term "craft or class" to be flexible, both geographically and otherwise, in order that the Mediation Board could, in its discretion, certify carrier-wide or less-than-carrier-wide units as the facts of each case might require. The failure of the Board to exercise that discretion necessitates the declaratory relief here sought by petitioners. Such relief will not *require* the Board to certify any particular organization or to designate any particular bargaining unit. It will simply free the Board from the erroneously self-imposed inhibition (resulting entirely from its misconstruction of the Act) against designation of smaller units. Whether originally independent railroad segments, such as the Western Division of the A. C. L., are to be treated separately or not will depend entirely on the sound discretion of the Mediation Board exercised in the light of all the facts of each case.

It should be noted here that if the decision of the Mediation Board were allowed to stand, the craft or class units under the Railway Labor Act would be subject to control, not by employees as intended by Congress, but by change in ownership over which the employees have no control. The rigid doctrine applied by the Board would permit the employer, by changing the corporate structure and modifying the craft or class at will, to lay the ground work not only for reopening the question of representatives but for compelling a result contrary to the free choice of bargaining representatives which the Act was designed to protect. The only alternative to this pernicious situation is to relieve the Board of any arbitrary restraint on the exercise of its discretion in the determination of bargaining units.

Denial of judicial review in this case would defeat the purposes of the Railway Labor Act. The effect of the Board's ruling in this case is to deprive petitioners of at

least two legally protected rights conferred on them by Section 2 of the Railway Labor Act—that is, the right given by Section 2, Fourth, "to organize and bargain collectively through representatives of their own choosing", and the right conferred by Section 2, Ninth, to have the employer "treat with the representative so certified as the representative of the craft or class for the purposes of this Act". The Supreme Court has held both of these rights to be entitled to judicial protection. In *Texas & N.O.R.R.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U. S. 548 (1930), it held that the right to organize and bargain collectively must be given legal protection. In *Virginian Ry.* v. *System Federation No. 40,* 300 U. S. 515 (1937), it held that the right to have the employer "treat with" the bargaining representative of the employees must be protected by court order. The Court further said that the employer had "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other" (p. 548).

Yet, when petitioners come before the Court seeking legal protection for their right to organize and bargain collectively through a representative of their choice, and their further right to have the employer treat with their representative and with no other union which might wrongfully claim to represent petitioners, respondents contend that the Court has no jurisdiction to grant relief.

Placing petitioners in an inappropriate bargaining unit would be perhaps the most effective possible way of depriving them of their statutory right to choose their own representative and bargain collectively through such representative. For instance, if petitioners were to be arbitrarily grouped with redcaps and porters in a single bargaining unit, they would always be outvoted and their interests as engineers plainly would not be properly represented. No one could contend that such a grouping was proper or legal. Yet respondents argue that the Court would be without jurisdiction to grant relief for petitioners in such a situation.

Petitioners firmly believe that the Board has placed them in an inappropriate bargaining unit and thereby deprived them of the many valuable rights outlined briefly above, including their right to choose their own representative and to bargain with their employer. Petitioners further believe that the Court has full power to grant the relief here sought.

In *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943), the Supreme Court held that, where Congress had made no express provision in the Railway Labor Act for judicial review, the Court would not "supply" such review in order to resolve a jurisdictional dispute between two rival unions. However, as will be noted more fully hereinafter, the Court indicated (320 U. S. 307) that review probably would be available in enforcement proceedings even in such a case.

Here there is no jurisdictional dispute, as only one labor union is a litigant, and petitioners are individual employees seeking to vindicate their right to bargain collectively through a representative of their own choosing.

Since the *Switchmen's Union* decision, Congress has passed the Administrative Procedure Act which, as will be demonstrated hereinafter, has specifically provided judicial review in this type of case and at the certification stage (rather than at the enforcement stage) of the proceeding. Hence, the original defect in the Railway Labor Act as revealed in the *Switchmen's Union* decision, which defect might have denied judicial review in this case and thus frustrated the collective bargaining policies of the Railway Labor Act, has been corrected (and for all practical purposes the Railway Labor Act has been amended) by the Administrative Procedure Act.

Also since the *Switchmen's Union* decision, the Supreme Court has held that it will grant review (irrespective of the Administrative Procedure Act) in cases involving designation of employee representatives where such review is

found to be necessary to prevent frustration of the purposes of the Railway Labor Act. *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711 (1945), 327 U. S. 661 (1946); *Order of Railway Conductors* v. *Swan*, 329 U. S. 520 (1947). It is recognized that those cases involve situations under the Railway Labor Act which are somewhat different from this case. However, petitioners believe that they indicate the type of reasoning which the Court should apply, in the light of the remedial purposes of the Administrative Procedure Act, in order to prevent nullification of petitioners' collective bargaining rights in the manner described above.

II. *No "Statutes Preclude Judicial Review" With Respect to This Case, and the Administrative Procedure Act Affirmatively Confers Judicial Review.*

Section 10 of the Administrative Procedure Act provides in part as follows:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> "(a) . . . Any person suffering legal wrong because of any agency action . . . shall be entitled to judicial review thereof.
>
> * * *
>
> "(c) . . . Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review . . .
>
> * * *
>
> "(e) . . . So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel

> agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ."

The sole question to be determined by the Supreme Court in this case is whether "statutes preclude judicial review", within the meaning of the introductory clause of Section 10 of the Administrative Procedure Act, with respect to the National Mediation Board's errors* of statutory interpretation. If no "statute" has the effect of "precluding" review, then clearly review is conferred by the Administrative Procedure Act. This is not disputed by any of the respondents, and it evidently was assumed by the Court of Appeals to be true.

This question may be broken down into two:

(1) What is meant by "preclude"—*i.e.*, what language in a statute is necessary to "preclude" review?

(2) What is meant by "statutes"—*i.e.*, is a "preclusion" of review to be derived only from very clear language appearing on the face of the statute itself, or may it be derived from such extrinsic sources as legislative history, general historical setting of the statute, etc.?

"Preclude" is a strong word. It was deemed by Congressman Walter, the sponsor of the Administrative Pro-

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* For purposes of the discussion in this brief, it will be assumed that the Mediation Board's interpretation of the Railway Labor Act was erroneous, since the petitioners firmly believe, and have so alleged, that the Board was wrong in its interpretation of the law, and since the Court of Appeals did not rule on the correctness or incorrectness of the decision of the Mediation Board. Evidently the Court of Appeals held that no judicial review would be available to correct errors of statutory interpretation, no matter how gross such errors may be.

cedure Act in the House, to be the equivalent of "prohibit" (Senate Document 248*, p. 380):

> "The decision of an agency created by statute that prohibits a review is the only one excluded. We are anticipating the possibility that some time or other such an agency will be erected."

The word "preclude" was also used in the Committee Reports as being synonymous with "withhold" (Senate Document 248, p. 275):

> "To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review."

It is quite clear from the legislative history that "preclusion" of review is radically different from "mere failure to provide specially by statute" for it. In addition to the above quotation, Congressman Walter stated on the floor of the House (Senate Document 248, p. 368) that "The mere fact that Congress has not expressly provided for judicial review would be completely immaterial."

In the *Switchmen's Union* case, *supra,* the Supreme Court did not find that the statute "precluded" judicial review. It simply declined to "infer" a provision for judicial review, on the basis of factors largely outside the language of the statute and not clear and convincing "upon its face".

The basis of the Supreme Court's ruling in the *Switchmen's Union* case is apparent from the following characterization of it by Mr. Justice Frankfurter in *Order of Railway Conductors* v. *Swan,* 329 U. S. 520, 530 (1947):

> "The decision in those cases [the *Switchmen's Union*

* The publication which will be cited in this manner throughout this brief is ADMINISTRATIVE PROCEDURE ACT, LEGISLATIVE HISTORY, Senate Document No. 248, 79th Congress, Second Session, 1946.

> case and its companion case decided at the same time] derived from the fact that Congress 'had not expressly authorized judicial review' and the history, the setting, and the implications of railway labor controversies counseled against inferring judicial review."

The *Switchmen's Union* decision itself (320 U. S. 306) states that the conclusion that no review was available was based on "inference . . . from the history of the Act."

In view of the Administrative Procedure Act, there is now no need to *infer* anything, for Congress has now "expressly authorized judicial review".

In the *Switchmen's Union* case the Court indicated (320 U. S. 301) that it was deciding, not whether judicial review was "precluded", but whether "judicial review may be nonetheless supplied" in a situation "Where Congress has not expressly authorized judicial review." Certainly the Court's refusal to "supply" review is quite different from holding that review is "precluded".

Congress has made clear in passing the Administrative Procedure Act that judicial review is no longer to be denied in cases similar to the *Switchmen's Union* case. In other words, Congress has stated that judicial review is not "precluded" by "statute" in such cases. The Administrative Procedure Act has changed the basic premises of the *Switchmen's Union* decision, as will be demonstrated hereinafter.

Specific indications of Congressional intent to provide judicial review in this type of proceeding include the following:

(1) *Inclusion of the National Mediation Board and its orders within the scope of the Administrative Procedure Act.*

There can be no doubt that the Administrative Procedure Act, including Section 10 thereof, applies to the Mediation Board. The definition of "agency" in Section 2 (a), as including ". . . each authority . . . of the Government of the United States other than Congress, the courts, or the gov-

ernments of the possessions, Territories, or the District of Columbia", is obviously broad enough to cover the Board, which is not excepted from the operation of the statute, as are some other agencies (Section 2 (a); see also 50 U. S. C. § 901a (h) (3)). The sponsor of the Act in the House of Representatives stated specifically on the floor of the House (Senate Document 248, p. 355) that:

> ". . . the National Mediation Board, another agency established under the Railway Labor Act, and not an agency composed of representatives of the parties or of representatives of organizations of the parties to disputes determined by them, is an agency within this definition."

Errors of law made by the Board in certifying a collective bargaining representative are clearly of the types which are subject to judicial review. Section 10 (a) permits review of "any agency action". Section 10 (c) further subjects to judicial review

> "every final agency action for which there is no other adequate remedy in any court."

Section 2 (g) defines "agency action" as including

> "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."

The certification clearly involves, at the very least, the granting (and denial insofar as the losing candidates for certification are concerned) of "relief". "Relief" is defined in Section 2 (f) in part as including

> "the whole or part of any agency . . . (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person."

It seems plain that the certification of a bargaining representative is at least a "recognition" of a "claim, right", or "privilege", and that such certification is made "upon the application or petition of", and is "beneficial to", a "person"—notably the representative so designated.

The certification likewise comes within the "scope of review" as defined in Section 10 (e), in that review would, where appropriate, "hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

Section 10(e) also requires the courts to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action". There can be no doubt that the questions of law involved in this case are for the courts to decide under the Administrative Procedure Act.

The Senate Judiciary Committee specifically emphasized "that questions of law are for *courts* rather than agencies to decide *in the last analysis*" (italics supplied) (Senate Document 248, p. 214).

(2) *Refusal of Congress to except certification proceedings from the Act and from judicial review.*

That Congress intended the certification of bargaining representatives to be subject to judicial review as to legal errors is clear from the fact that "the certification of employee representatives" is *specifically* excepted from certain procedural requirements stated in Section 5 of the Administrative Procedure Act (and therefore from provisions of Sections 7 and 8), but is not so excepted from Section 10 (the review section). Certainly if Congress had intended to except such certification from judicial review, it would have been equally explicit in stating that intention.

The legislative history of the Administrative Procedure Act clearly shows that, in enacting Section 10, Congress *chose deliberately* not to except questions of law arising from certifications of employee representatives. The Senate Judiciary Committee reported on this matter (Senate Document 248, p. 38).

> "(2) It is objected that the provision for judicial review of 'every final agency action for which there is no other adequate remedy in any court' would provide judicial review of certification proceedings in labor representation cases. . . . Whether NLRB representation cases are so reviewable in equity has not yet been decided by the Supreme Court. The question the Court must decide under general law or this subsection is whether subsequent review in enforcement proceedings is 'adequate'. To except certification proceedings in this bill would prejudge the question."

From the foregoing quotation it is clear that, although Congress had its attention directed specifically to the matter when it had Section 10 of the Act under consideration, it declined to except "certification proceedings in labor representation cases" from the judicial review provisions of the Act. It further appears that Congress felt that the only basis on which the courts might deny review of such certifications would be a finding that "subsequent review in enforcement proceedings is 'adequate' ". In this connection it should be noted that such "subsequent review" could never be "adequate" for those in the position of petitioners in this case, since both the prosecution and defense of an enforcement proceeding under the Railway Labor Act would be entirely out of their hands and they have no assurance that such an enforcement proceeding will ever occur. In the vast majority of cases, the employer accepts the certification, and there is no reason for enforcement proceedings.

It is, of course, true that the Senate Judiciary Commit-

tee's statement quoted above refers specifically to National Labor Relations Board certification cases, although it first refers generally to "certification proceedings in labor relations cases". It is clear that Congress did not mean to provide judicial review for National Labor Relations Board certifications while excluding review for Mediation Board certifications. Any such intention would surely have been stated specifically. The contrary intention has been stated by the Committees of Congress in the following language:

Senate Judiciary Committee (Senate Document 248, p. 191):

> "The committee feels that it has avoided the mistake of attempting to oversimplify the measure. It has therefore not hesitated to state functional classifications and exceptions where those could be rested upon firm grounds. In so doing, it has been the undeviating policy to deal with types of functions as such and in no case with administrative agencies by name. . . ."

House Judiciary Committee (Senate Document 248, p. 250):

> "Functional classifications and exemptions have been made, but in no part of the bill is any agency exempted by name. The bill is meant to be operative 'across the board' in accordance with its terms, or not at all. Where one agency has been able to demonstrate that it should be exempted, all like agencies have been exempted in general terms. (See sec. 2(a)). Where one agency has shown that some particular operation should be exempted from any particular requirement, the same function in all agencies has been exempted. No agency has been favored by special treatment."

Thus Congress specifically refused to except from judicial review questions of law arising from Mediation Board certification proceedings, and expressed the intention that such review could be denied under the Administrative Procedure Act *only if* "subsequent review in enforcement pro-

ceedings" would be "adequate". This expression of opinion by the Committees clearly shows that Congress did not believe that the introductory clause of Section 10 of the Administrative Procedure Act would be effective to deny review in this type of case. Since "subsequent review in enforcement proceedings" would not be adequate in this case, judicial review is available pursuant to Section 10 of the Administrative Procedure Act.

(3) *Clear statements of Congressional intention to provide judicial review where it was not previously available.*

The broad purpose of the Administrative Procedure Act is apparent from the Congressional Committee reports. The Senate Judiciary Committee stated that the bill, in comparison with the Walter-Logan Bill (passed by Congress but vetoed by the President in 1940),

> "... contains more comprehensive provisions for judicial review for the redress of any legal wrong" (Senate Document 248, p. 192).

Both the House and Senate Judiciary Committees stated concerning the Administrative Procedure Act that:

> "It sets forth a simplified statement of judicial review designed to afford a remedy for every legal wrong (sec. 10)" (Senate Document 248, pp. 193, 251).

On the floor of the Senate, Senator McCarran (the author of the Act) stated with respect to the purpose to supply every existing lack of judicial review (Senate Document 248, p. 325):

> "Mr. Austin. In the event that there is no statutory method now in effect for review of a decision of an agency, does the distinguished author of the bill contemplate that by the language he has chosen he has given the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth?

"Mr. McCarran. My answer is in the affirmative. That is true."

Senator McCarran further stated (Senate Document 248, p. 318) that the provision of judicial review was the "principal purpose" of the Act, as follows:

"Mr. McKellar. May I ask the Senator a very general question, which will show that I have not examined the bill with care? Do I correctly understand that the principal purpose of the bill is to allow persons who are aggrieved as the result of acts of governmental agencies to appeal to the courts?"

"Mr. McCarran. Yes."

Since passage of the Act, Senator McCarran has made the following authoritative analysis of Section 10, which should serve to lay at rest any contention that the "existing law" on judicial review was unchanged by the Administrative Procedure Act, or that administrative agencies still may have *conclusive authority* to interpret statutes, or unlimited "discretion" in the administration of the law (32 A. B. A. J. 831, 893 (1946)):

"(8) So much for questions of fact. But what of questions of law? The Act simply and expressly provides that Courts 'shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action'. Its further premise, moreover, is that discretion must be exercised in a sound and rational manner, and within the objectives permissible under law. * * *

"Judicial Review of Agency Discretion

"Judicial review is suspended only 'so far as' agency action is 'by law' committed to agency discretion. Committed 'by law' means, of course, that claimed discretion must have been intentionally given to the agency by the Congress rather than assumed by it in the ab-

sence of express statement of law to the contrary. 'Abuse of discretion' is expressly made reviewable.

"It should come to no one as a surprise, therefore, that the measure was explained on the floor of the Senate as providing for judicial review of the arbitrary exercise of discretion or of the exercise of discretion based on unsound reasoning—or that on the floor of the House of Representatives it was explained in the following words:

> 'There are exempted [from judicial review] matters to the extent that they are by law committed to the absolute discretion of administrative agencies. There has been much misunderstanding and confusion of terms respecting the discretion of agencies. They do not have authority in any case to act blindly or arbitrarily. They may not willfully act or refuse to act. Although like trial courts they may determine facts in the first instance and determine conflicting evidence, they cannot act in disregard of or contrary to the evidence or without evidence. They may not take affirmative or negative action without the factual basis required by the laws under which they are proceeding. Of course, they may not proceed in disregard of the Constitution, statutes, or other limitations recognized by law.'

"It would be hard, therefore, for anyone to argue that this Act did anything other than cut down the 'cult of discretion' so far as federal law is concerned.

"Plenary Review of 'Legal Wrong' by Action or Inaction

"(9) Finally, the Act expressly provides not only that every instance of 'legal wrong' shall be subject to judicial review but that adequate intermediate judicial relief shall be provided, that inaction shall be as much subject to review as excessive action, and that every recognized type of question of law—including supporting evidence for findings upon which agency action rests—shall be subject to judicial review. It is therefore a major premise of the statute that judicial review is not merely available but is plenary in every proper sense of the word. * * *

> "If indeed there is any danger to good and efficient government in the Act, that danger lies in its becoming merely a form through indifferent administration, reluctant interpretation, or insufficient public understanding."

A further indication of the intention of Congress to extend both the availability and the scope of judicial review through passage of the Administrative Procedure Act appears from the following discussion of the recommendation made by the minority of the Attorney General's Committee on Administrative Procedure, and the effect of that recommendation, which was followed by Congress in creating Section 10 of the Administrative Procedure Act (McFarland and Vanderbilt, CASES ON ADMINISTRATIVE LAW (1947) 845):

> "The minority of the Committee recommended that Congress 'provide more definitely by general legislation for both the availability and scope of judicial review in order to reduce uncertainty and variability' and therein, among other things, require that all findings of fact be supported by adequate evidence, 'including inferences and conclusions of fact, upon the *whole* record' (p. 211). At the Senate hearing which followed the submission of that report Attorney General Biddle, who had been a member of the Committee, submitted a written statement that a statutory provision 'would be feasible' and submitted proposed language. Hearings, *Administrative Procedure*, on S. 674, 675, and 918, Subcommittee of Senate Judiciary Committee, 77th Congress, p. 1452. And the federal Administrative Procedure Act, since adopted, alters the entire cast and setting of the subject."

It seems clear from the foregoing that it was the intention of Congress to make judicial review available in cases where it previously had not been supplied by the Courts.

(4) *Explicit statements of Congress that judicial review could be denied under the Administrative Procedure Act*

only where preclusion of review appears clearly and convincingly on the face of the statute.

Although it is not necessary for purposes of this case, a strong argument could be made, on the basis of the legislative history, that judicial review would not be "precluded" within the meaning of the Administrative Procedure Act unless the statute in question *expressly* said that review was prohibited.

Congressman Robsion said on the floor of Congress (Senate Document 246, p. 384), without contradiction, that:

> "As I understand this bill, it does not give the right of appeal in cases where Congress has expressly stated there can be no appeal; but unless the right of appeal is denied, I think an appeal could be taken as a matter of course where there was a proper showing that the constitutional rights of the aggrieved party had been invaded; that the act itself did not sustain the award or judgment and an appeal can be taken where Congress provided in the act that an appeal could be taken and the way and manner in which it could be made."

Congressman Robsion further said (Senate Document 248, p. 384):

> "Some of the acts of Congress expressly exclude an appeal in some cases, and the bill before us excludes the Selective Service Act and a number of other acts."

There are indications in the manner of drafting of the Administrative Procedure Act that a distinction is drawn between "statute" and "law", and that "statute" in all cases refers to the express language of the Congressional enactment, while "law" comprises court decisions, interpreting statutes or otherwise, treaties and other sources of authority.

Thus, the Attorney General (who apparently contends*, inconsistently, that a Court decision — the *Switchmen's*

* See footnote, *infra*, p. 44.

Union case—constitutes a statutory "preclusion" under Section 10 of the Act) has the following to say with respect to Section 9 (a) which prohibits any agency from using sanctions other than those "authorized by law" (ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) 88):

> "The original draft of section 9 (a) limited the imposition of sanctions to those 'as specified and authorized by statute.' Senate Comparative Print, June 1945, p. 17 (Sen. Doc. p. 159). The change of the word 'statute' to 'law' was intentional so as to recognize that an agency may impose a sanction or issue a substantive rule or order if such power is authorized not only by statute but by treaties, court decisions, commonly recognized administrative practices, or other law. See *United States* v. *MacDaniel,* 7 Pet. (32 U. S.) 1, 13-14 (1833)."

Likewise, the Attorney General reaches the same result (id. 41) in respect to Section 5—a situation which cannot be distinguished analytically from the introductory language of Section 10:

> "It will be noted that the formal procedural requirements of the Act are invoked only where agency action 'on the record after opportunity for an agency hearing' is required by some other *statute.* The legislative history makes clear that the word 'statute' was used deliberately so as to make sections 5, 7 and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. Senate Hearings (1941) pp. 453, 577; Senate Comparative Print of June 1945, p. 7 (Sen. Doc. p. 22); House Hearings (1945) p. 33 (Sen. Doc. p. 79); Sen. Rep. p. 40 (Sen Doc. p. 226); 92 Cong. Rec. 5651 (Sen. Doc. p. 359). Mere statutory authorization to hold hearings (e.g., 'such hearings as may be deemed necessary') does not constitute such a requirement. In cases where a hearing is held, although not required by statute, but as a matter of due process or agency policy or practice, sections 5, 7 and 8 do not apply. Senate Hearings (1941) p. 1456."

Also, it may be noted that Section 12 of the Administrative Procedure Act refers to "requirements imposed by statute or otherwise recognized by law," indicating a distinction between "statute" and "law".

Assuming the Attorney General's premise that "statute" refers to *specific statutory provision*, whereas "law" has a much broader connotation, it becomes obvious that the introductory clause of Section 10 (where "statute" and "law" appear in close juxtaposition) means that "statutes" preclude judicial review only by *express* provision to that effect.

It is recognized that the bill as originally introduced contained the language "statutes expressly preclude judicial review", and that the word "expressly" was later deleted in the course of substantial revision of the introductory clause of Section 10. No explanation of that particular change appears in the legislative history, but bearing in mind the fact that, as the Attorney General says, Congress considered "statute" to mean "express statutory provision", and amended Section 9 (a) to conform with this conception, as noted above, it seems that Congress was merely eliminating a redundancy, and intended no change whatsoever by the deletion of the word "expressly".

This conclusion is reinforced by a comment made by the Senate Judiciary Committee in connection with the introductory clause of Section 10 at the time the word "expressly" was deleted (Senate Document 248, p. 36):

> "Where Congress has desired to place pension or benefit cases beyond court review, it has—as in the case of the Veteran's Administration—done so by express statute which is specifically preserved by the introductory clause of this section."

This is a clear indication by Congress of the manner in which it expects "statutes" to "preclude" judicial review. As a further example of the manner in which Congressional

statutes "preclude" judicial review, see the Emergency Price Control Act, 50 U. S. C. (Supp. 1946) § 901a (h) (3): "Orders of the [Price Decontrol] Board shall not be subject to modification or review by any other department or agency or by any court."

A further reference to the legislative history provides additional support for the conclusion that "statutes" preclude review only when they do so expressly. It is universally recognized that the Administrative Procedure Act had its origin in the work of a Committee of the American Bar Association headed by Mr. Carl McFarland (Senate Document 248, p. 394). That committee was responsible for a publication entitled LEGISLATIVE PROPOSAL ON FEDERAL ADMINISTRATIVE PROCEDURE (1944) which contained a draft of a bill similar to the ones which eventuated in the Administrative Procedure Act. With respect to a proposed provision in this bill preserving "all statutory provisions precluding judicial review," that booklet contained the following comment (p. 40): "Judicial review has been forbidden by Congress in few instances including, and perhaps limited to, decisions of the Administrator of Veteran's Affairs (48 Stat. 9, 38 U. S. C. 705; 54 Stat. 1193)."

Congress had before it at the time it passed the Administrative Procedure Act the statement of a sponsor of the bill that only one statutory preclusion of review would be preserved under the introductory clause of Section 10 (Senate Document 248, p. 380):

> "Mr. Dolliver. I was referring to exactly the point that the gentleman has raised, that there are certain statutory exclusions now existing which are not covered by this bill. Perhaps there is just one such agency and I believe the gentleman and I understand which one that is. I still say I would welcome an opportunity to consider legislation which would include that excluded agency."

From all these indications it might well be concluded that

Congress meant "statutes" to be deemed to "preclude" judicial review only where they say so specifically, and not where, as in the *Switchmen's Union* case, the Court's decisions merely refuse to "supply" or "infer" a review not spelled out by Congress.

But, in any event, Congress has now made it clear that a lack of judicial review cannot be found by the courts from extraneous evidence not appearing clearly and convincingly on the face of the statute itself. As the House Judiciary Committee stated (Senate Document 248, p. 275):

> "To preclude judicial review under this bill a statute, if not specific in withholding such review, *must upon its face* give *clear and convincing* evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review" (Italics supplied).

The major premise of the Supreme Court in the *Switchmen's Union* case was that:

"There is no general provision for such review" (320 U. S. at 305).

In the absence of such a "general provision" the Court felt impelled to look to many factors to ascertain whether judicial review should be "inferred". As the Court said:

> "Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied" (p. 301).
>
> "And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved" (p. 303).

In seeking to decide the question in the absence of statutory direction, the Court relied on many factors which do not appear on the *face of the statute* at all, including:

(1) "Until the 1926 Act the legal sanctions of the various acts had been few";

(2) In the past, "The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion";

(3) "Since 1926 there has been an increasing number of legally enforcible commands incorporated into the Act";

(4) However, "large areas of the field still remain in the realm of conciliation, mediation, and arbitration";

(5) Commissioner Eastman stated at the time that Section 2, Ninth was introduced that "one of the most controversial questions in connection with labor organization matters" was the question of choice between two or more organizations seeking to represent a particular group of employees;

(6) Section 2, Ninth was designed to "protect the Mediation Board in its handling of an explosive problem";

(7) The Court felt that "if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain."

(8) The Court thought that Congress deliberately omitted specific review provisions as to some matters, since it provided review in two instances, "And the inference is strong from the history of the Act that that distinction was not inadvertent."

It is clear from the foregoing quotations that the Supreme Court took the view that absence of a specific provision for review meant that no review was available unless indications outside the express provisions of the Act should lead to the conclusion that review should be "supplied" or "inferred".

That such has been the Court's approach, and that the Court has started from the premise that lack of an express

provision raises a presumption of nonreviewability, appears from the Court's statement in *Estep* v. *United States*, 327 U. S. 114, 119-120 (1946):

> "Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive.
>
> "For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90; *Gegiow* v. *Uhl*, 239 U. S. 3, 36 S. Ct. 2, 60 L. Ed. 114; *Stark* v. *Wickard*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733. Judicial review may indeed be required by the Constitution. *Ng Fung Ho* v. *White*, 259 U. S. 276, 42 S. Ct. 492, 66 L. Ed. 938. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301, 64 S. Ct. 95, 97, 88 L. Ed. 61. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses."

The Court said further in *Fahey* v. *Mallonee*, 332 U. S. 245, 256 (1947):

> "We do not now decide whether the determination of the Board in such proceeding is subject to any manner of judicial review. The absence from the statute of a provision for court review has sometimes been held not to foreclose review. *Stark* v. *Wickard*, 321 U. S. 288, 64 S. Ct. 559, 88 L. Ed. 733; *Board of Governors of Federal Reserve System* v. *Agnew*, 329 U. S. 441, 67 S. Ct. 411; Administrative Procedure Act, § 10, 5 U. S. C. A. § 1009."

From this language it seems clear that the Court in the

past has thought the absence from a statute of an express provision for review prevented review unless there were positive indications elsewhere that review must be granted. Under the Administrative Procedure Act, such an approach to statutory construction is prohibited, for judicial review is specifically provided unless "*statutes* preclude review". The courts are not to go beyond the *face of the statute itself* to obtain evidence of Congressional intent to withhold review.

In view of the clear mandate of Congress, the courts can not now look to the "whole setting" or "the type of problem involved and the history of the statute in question" to determine that judicial review is not to be supplied. If the *face of the statute* does not *preclude* review, it is available under the Administrative Procedure Act, and "The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review" (Senate Document 248, p. 275). In fact, such failure is "completely immaterial" (Senate Document 248, p. 368).

It is clear that the failure of Congress to provide specifically for judicial review was not "completely immaterial" in the *Switchmen's Union* case. It was the very cornerstone of the opinion, as appears in that decision and as further appears from subsequent explanations in the *Estep* case and the *Fahey* case, cited above.

The net effect of the Administrative Procedure Act on the decision in the *Switchmen's Union* case appears to be this: Whereas formerly the Supreme Court felt that the absence of a statutory provision for review raised a presumption of nonreviewability, rebuttable only by factors within or without the statute indicating that review was required, the Administrative Procedure Act has created the reverse presumption (that all administrative actions are subject to review), which is rebuttable only by factors appearing on the *face of the statute* and giving "*clear and convincing* evidence of an intent to withhold" review.

It may be noted in passing that even the evidence of Congressional intent which the majority of the Supreme Court obtained from sources other than the face of the statute in the *Switchmen's Union* case was not "clear and convincing" to all of the Justices, as the decision was based on a four to three vote (two Justices not participating). In view of that fact, and the entirely new standards of statutory interpretation introduced by the Administrative Procedure Act, it is submitted that the Supreme Court should now hold that judicial review is available in this case.

(5) *Specific statements by Congressional sponsors of the Administrative Procedure Act that judicial review is made available in this type of case.*

Not only did Congress indicate generally its intent that judicial review should be made available where no review was previously provided specifically by statutes or through judicial decisions, but the sponsors of the Administrative Procedure Act in Congress clearly showed that they intended to supply judicial review in precisely the type of case here presented.

The specific intent of Congress to supply judicial review of questions of law in such cases as certification of labor representatives is apparent from the following colloquy on the floor of the Senate (Senate Document 248, p. 311):

> "Mr. Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> "Mr. McCarran. That is correct.
>
> "Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?

"Mr. McCarran. That is true; the Senator is entirely correct in his statement."

This statement of Senator McCarran is significant enough on a casual reading, for it indicates an intention that judicial review shall now be available in all cases where it had previously been denied by the courts because of failure of the statute to specifically provide for review. That in itself would be sufficient to demonstrate the existence of judicial control in this case. But the statement is far more significant when it is realized that the *only* "cases cited" in the entire legislative history of the Administrative Procedure Act in which "*no review was granted . . . because the statute did not provide for review*" were the *Switchmen's Union* case, *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401 (1940) and *Butte, Anaconda & Pacific Ry.* v. *United States*, 290 U. S. 127 (1933), all cited in the Attorney General's memorandum* attached to the Senate Judiciary Committee's Report (Senate Document 248, p. 230).

This colloquy between Senators Austin and McCarran leads to at least three conclusions: (1) that Congress had its specific attention called to the "defect" in the Railway Labor Act as shown by the *Switchmen's Union* case; (2) that Congress intended the Administrative Procedure

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* The Attorney General's comment on these three cases appears to suggest that Section 10 of the Administrative Procedure Act merely "declares the existing law concerning judicial review," and that judicial review can be "precluded" by court inference from the setting of a statute. The assertion that Section 10 is merely declaratory of existing law was repeatedly denied by Congressional leaders (Senate Document 248, pp. 193, 303-304, 311, 318; see also the quotations from McFarland and Vanderbilt, *supra*). His intimation (which may not have been intended) that judicial review might still be "precluded" by judicial "inference" from legislative history, etc., is clearly refuted by the statement of the House Committee (Senate Document 248, p. 275) that in order for a statute to preclude review it "must *upon its face* give *clear and convincing* evidence of an intent to withhold it." See also discussion under sub-caption 4 of this section of this brief, and the further discussion under this sub-caption 5.

Act to "remedy" that "defect" and provide "a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned"; and (3) that Congress either did not interpret the Attorney General's memorandum as saying that the Administrative Procedure Act would leave the *Switchmen's Union* situation unchanged, or it did not agree with that conclusion.

Equally significant is the following colloquy on the floor of the House, involving Congressman Walter, the sponsor of the bill in the House and the Chairman of the House Subcommittee (Senate Document 248, p. 380):

> "Mr. Dolliver. . . . I believe I should welcome the opportunity to vote for a bill that would curtail the exclusions with respect to judicial review that are here contained.
>
> • • •
>
> "Mr. Walter. I would like to call the gentleman's attention to the fact that there is no exclusion whatsoever. The decision of an agency created by statute that prohibits a review is the only one excluded. We are anticipating the possibility that some time or other such an agency will be erected."

It will be noted that it was immediately following this answer by Congressman Walter that Congressman Dolliver made the statement, quoted above, that judicial review was then precluded by statute with respect to decisions of only one administrative agency—the Administrator of Veterans' Affairs, as revealed by the earlier history. This is a clear indication that Congress did not consider errors of legal interpretation of the Mediation Board to be exempt from judicial review under the Administrative Procedure Act.

Congressman Walter made the further significant statement (Senate Document 248, p. 368):

> "Two general exceptions are made in the introductory clause of section 10. The first exempts all matters

> so far as statutes preclude judicial review. Congress has rarely done so. Legislative intent to forbid judicial review must be, if not specific and in terms, at least clear, convincing, and unmistakable under this bill. The mere fact that Congress has not expressly provided for judicial review would be completely immaterial—see *Stark* v. *Wickard* (321 U. S. 288 at p. 317)."

The reference to *Stark* v. *Wickard* is most revealing, as the page citation given by Congressman Walter is to Mr. Justice Frankfurter's dissent in which he strongly urged that the reasoning of the *Switchmen's Union* case be applied to deny judicial review in that case. In other words, Congressman Walter was stating that the Administrative Procedure Act would constitute an express overriding by Congress of the basic reasoning of the *Switchmen's Union* decision.

Also significant in this connection is the statement of Senator McCarran, quoted above, that (Senate Document 248, p. 325): "In the event that there is no statutory method now in effect for review of a decision of an agency," it was the purpose of the Administrative Procedure Act to give "the right to the injured party or the complaining party to a review by such extraordinary remedies as injunction, prohibition, quo warranto, and so forth."

As noted above, Section 5 of the Administrative Procedure Act specifically exempts "the certification of employee representatives" from the provisions of Sections 5, 7 and 8, but such certification is not exempted from the review provisions of Section 10. This selective exemption of employee certifications from parts of the Act while leaving them subject to judicial review is indicative of an intent to provide review—an intent which is confirmed, as demonstrated above, by the Senate Judiciary Committee's statement (Senate Document 248, p. 38) that judicial review could be denied under the Administrative Procedure Act *only if* "subsequent review in enforcement proceedings is 'adequate' ", with no suggestion that review would be

unavailable or that it would be denied on the ground that statutes "preclude" it.

Finally in this connection it should be reemphasized that Section 10(a) requires the *courts* to "decide all relevant questions of law", and the Senate Judiciary Committee stated (Senate Document 248, p. 214) "that questions of law are for courts rather than agencies to decide in the last analysis." This provision obviously is aimed at the principle of the *Switchmen's Union* case—that the statutory interpretations made by the Mediation Board should be final whether erroneous or not. As Senator McCarran said (32 A. B. A. J. 893), a purpose of the Act, which he thought had been achieved, was to "cut down the 'cult of discretion' so far as federal law is concerned."

It is universally recognized that a remedial statute (being designed to protect, and not to derogate from, the rights of individuals) is to be liberally construed in order to effectuate its purpose. 59 C. J. 1106-1110; 50 Am. Jur. § 393. The history of the Administrative Procedure Act, running from 1935 (when the American Bar Association began work on its proposal for administrative reform—Senate Document 248, p. 394) until passage of the Act in 1946, demonstrates beyond question that its purpose is to remedy evils thought by Congress to exist. One of the evils specifically mentioned by the various sponsors of the Act was, as demonstrated above, the lack of judicial review in some situations —including the type of case here involved.

Not one member of Congress disputed the assertion of the sponsors that the Administrative Procedure Act would provide review where it did not previously exist.

The usual rule requiring liberal interpretation of remedial statutes is reenforced in this instance by clear expressions by the sponsors of the Act, urging such an interpretation.

The legislative history reveals rather unusual pleas for

sympathetic judicial interpretation of the Act. The Senate Judiciary Committee said (Senate Document 248, p. 217):

> "Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These definitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.
>
> "It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used."

Senator McCarran made a similar statement in the Senate (Senate Document 248, p. 326).

Representative Hobbs said in the House (Senate Document 248, p. 382):

> "We hope and pray that the plain meaning of this law will be so correctly interpreted as to effectuate its high purpose."

It will thus be seen that specific statutory provisions, plain indications in the legislative history, and the general spirit and purpose of the Administrative Procedure Act itself require that judicial review be accorded the petitioners in this case.

Aside from the indications in the language of the Administrative Procedure Act itself and in the legislative history, as set forth above, there is substantial and eminent authority for the conclusion that judicial review is conferred by that Act in cases such as this where review previously was thought not to exist.

The only Circuit Court of Appeals which has thus far squarely faced the question whether the *availability* of ju-

dicial review has been extended by the Administrative Procedure Act, has reached the conclusion that it has been extended. In *United States ex rel. Trinler* v. *Carusi,* 166 F. (2d) 457 (C. C. A. 3d, 1948), the Court held that direct judicial review is now available with respect to deportation orders of the Attorney General, despite the fact that such orders are made "final" by the statute and that previously the only form of attack on such orders was in habeas corpus proceedings.

In so holding, the Circuit Court stated (166 F. (2d) 461):

> "In this we are supported, we think, by discussion found in the legislative history of the Act. In that discussion it was pointed out that statutes which preclude judicial review are unusual. Congressman Walter pointed out to the House of Representatives that this clause was simply put in to provide for the unusual situation where judicial review of administrative action was actually precluded."

The Court further said (166 F. (2d) 461, footnotes 14 and 15):

> "In five of the six bills introduced, the original phrase in the section prescribing judicial review was 'expressly preclude'. The elimination of the word 'expressly' in the bill which finally became law has no significance other than to indicate that the failure of the basic statute to contain the exact words 'precludes review' is not conclusive. But the words of the Act when given their ordinary meaning and reference to the legislative history makes it clear that a mere failure to provide for review or an intent to limit the review granted does not place a statute within the 'excepting clause' of the Act. See Administrative Procedure Act —Legislative History, supra pp. 131-183 (various bills introduced), 311, 318, 325, 212.
>
> "That it was the Congressional intent to make new law in this connection is evident from the answers given by the sponsor of the bill when it was being presented to the Senate. See Administrative Procedure Act—

Legislative History, Sen. Doc. No. 248, 79th Cong., 2d Sess. pp. 311, 318, 325."

It is true that the Circuit Court placed some emphasis on the fact that a form of judicial review had previously been available in habeas corpus proceedings. That fact, however, does not distinguish the *Trinler* case from the instant case. In the *Switchmen's Union* case the Supreme Court expressly reserved the question whether the legality of employee certifications could be reviewed in enforcement proceedings (320 U. S. 307). However, the Court's discussion of the matter, and its citation of *Virginian Railway v. System Federation No. 40,* 300 U. S. 515 (1937), at pages 559-562 (where the Supreme Court actually determined the legality of such a certification in an enforcement proceeding) would seem to indicate that that form of review has always been available.

Assuming that, if the question had been raised, the Supreme Court would have adhered to its action in the *Virginian Railway* case and would have reviewed Mediation Board employee representative certifications in enforcement proceedings, then the reasoning of the Circuit Court in the *Trinler* case is directly applicable to this one. Just as in the *Trinler* case, petitioners are asking the Court to make direct review available with respect to legal points arising out of employee certifications, rather than force a delay until an enforcement proceeding is brought—a delay which would completely defeat the petitioners' rights.

Not only is the *Trinler* decision authority for the position of petitioners, but the District Court which first decided the *Trinler* case pointed out* that the there applicable "deportation statute does more than merely fail 'to provide specially by statute for judicial review' ", and remarked that "Such is not the case, it is true, with situations which have arisen under the National Labor Relations Act . . . and the Railway Labor Act," citing the *Switchmen's Union*

* 72 F. Supp. 193, 196 (E.D. Pa. 1947).

case. The Court further stated that "The Administrative Procedure Act may conceivably provide judicial review of the operation of these agencies where none existed before, although the Court expresses no opinion on that. But the statute in this case is not silent on the question of review. It affirmatively states that in orders of deportation, 'the decision of the Attorney General shall be final.' "

The decision of the Circuit Court has been followed by the District Court for the Southern District of New York in *United States ex rel. Cammarata v. Miller,* F. Supp. (S.D.N.Y. 1948).

A similar decision holding that the availability of judicial review has been extended by the Administrative Procedure Act is *Snyder v. Buck,* 75 F. Supp. 902, 908 (D.D.C. 1948), where the Court said:

> "The Court is not unmindful of the fact that some statements have been made to the effect that Section 10 is merely declaratory of existing law of judicial review, and does not confer jurisdiction on the courts beyond that which they already had, e. g. *Olin Industries v. National Labor Relations Board,* D.C.Mass., 72 F. Supp. 225. While this Court has examined many of these statements, it is unable to agree with them. On the other hand, McGranery, J., in *United States v. Carusi,* D.C.E.D. Pa., 72 F. Supp. 193, 196, said: 'The Administrative Procedure Act may conceivably provide judicial review of the operation of these agencies where none existed before, although the Court expresses no opinion on that.' "

There are numerous decisions indicating that judicial review has been extended to new situations by the Administrative Procedure Act. See *Lincoln Electric Co. v. Commissioner,* 162 F. (2d) 379, 382 (C.C.A. 6th, 1948); *United States ex rel. Lindenau v. Watkins,* 73 F. Supp. 216, 219 (S.D.N.Y. 1947); *Ohio Power Company v. National Labor Relations Board,* 164 F. (2d) 275 (C.C.A. 6th, 1947).

From the foregoing, it is apparent that the weight of judicial opinion is that Section 10 of the Administrative Procedure Act does enlarge the scope and extend the availability of judicial review. Comment on the matter in legal periodicals is divided. Several articles hold that Section 10 expands judicial review very greatly. See Blachly and Oatman, *The Administrative Procedure Act* (1946) 34 Geo. L. J. 407; Cohen, *Legislative Injustice and the Supremacy "of Law"* (1947) 26 Neb. L. Rev. 323-345; Dickinson, *Administrative Procedure Act: Scope and Grounds of Broadened Judicial Review* (1947) 33 A.B.A.J. 434; Kaufman, *The Federal Administrative Procedure Act* (1946) 26 B. U. L. Rev. 479-517; and Schwartz, *American Administrative Procedure Act, 1946* (1947) 63 Law Quarterly Rev. 43.

The last cited authority states (p. 61) that "In general, all final administrative action . . . has been subject to judicial review. The Administrative Procedure Act re-states this principle, at the same time doing away with the few judicial self-imposed exceptions to it which have been developed . . ." A footnote to that statement is as follows: "See, *e.g., Switchmen's Union v. National Mediation Board,* 320 U. S. 297 (1943); *American Federation of Labor v. National Labor Relations Board,* 308 U.S. 401 (1940)."

Thus the most specific discussion of the problem at hand reaches the conclusion that judicial review is now available in certification cases.

A note appearing in (1947) 96 U. Pa. L. Rev. 268, 269 states that the District Court's ruling denying judicial review in the *Trinler* case, *supra,* was "less than consistent with Congressional intent," citing Senate Document 248, pp. 36, 212, 275, 308, 310-311. It is apparent that the writer of that comment relied upon some of the same authorities cited above, and reached the conclusion that Congress intended to extend the availability of judicial review by its passage of the Administrative Procedure Act.

It is recognized that certain law review articles have as-

serted that Section 10 of the Administrative Procedure Act does not extend the availability of judicial review. However, it should be noted that most of such articles have been written by attorneys in the Justice Department or other Government lawyers, who apparently have been misled by the Attorney General's memorandum, discussed above, and who act as counsel for administrative agencies seeking to avoid judicial review.

In any event, the intent of Congress is the controlling issue, and that intent, as discussed above, was and is clearly to provide judicial review in the type of case involved in this proceeding.

III. ***Certiorari Should Be Granted in Order to Resolve the Conflict Between the Decision of the Court of Appeals in This Case and a Decision of the Circuit Court of Appeals for the Third Circuit.***

There appears to be a direct conflict between the decision of the Court of Appeals in this case and the decision of the Circuit Court of Appeals for the Third Circuit in the case of *United States ex rel. Trinler v. Carusi, supra.*

In the *Trinler* case, the Court held that "statutes" do not "preclude" review within the meaning of the Administrative Procedure Act merely because previous court decisions declined to provide review in the absence of an express statutory provision therefor (in the *Trinler* case, there was not only no statutory provision for review, but, contrary to the situation in this case, there was an express provision that rulings of the Attorney General should be "final"—a provision which previously had been interpreted to mean that no judicial review was available except to the limited extent permitted in habeas corpus proceedings).

In the instant case, the Court of Appeals held that a previous Court decision declining to "infer" judicial review in the absence of an express statutory provision must mean

that "statutes preclude judicial review" within the meaning of the Administrative Procedure Act.

In the *Trinler* case, the Court specifically held (166 F. (2d) 461) that Congress intended to "make new law" with respect to the availability of judicial review where such review was previously unavailable.

In the instant case the Court of Appeals held that the Administrative Procedure Act did not change the law with respect to the availability of judicial review.

In the *Trinler* case the Circuit Court held that previous availability of a limited form of review (habeas corpus) helped to establish that review was not "precluded" by a statute.

In the instant case, the Court of Appeals failed to find that judicial review is not "precluded" by statute, despite the fact that the courts have in the past granted a limited form of review (in an enforcement proceeding) with respect to the legality of employee representative certifications by the Mediation Board. *Virginian Railway v. System Federation No. 40, supra; Switchmen's Union v. National Mediation Board, supra* (320 U.S. at 307).

The conflict between the *Trinler* decision and this one is pointed up by the discussion in the District Court's disposition of the case (72 F. Supp. 196):

> "The Administrative Procedure Act may conceivably provide judicial review of the operation of these agencies [the National Labor Relations Board and the National Mediation Board] where none existed before . . . But the statute in this case is not silent on the question of review. It affirmatively states that in orders of deportation, 'the decision of the Attorney General shall be final' ".

The decision of the Court of Appeals in the instant case fails to come to grips with the real issues. It starts off with the *assumption* that the *Switchmen's Union* decision established "preclusion" of judicial review—thus ignoring the

many indications in the Administrative Procedure Act and its legislative history (recognized in large part by the Circuit Court in the *Trinler* case) that mere failure of a statute to provide judicial review is immaterial in finding either availability or preclusion of review, and that a statute does not preclude review unless it does so clearly and convincingly on its face. The Court of Appeals failed further to note that the Supreme Court's decision in the *Switchmen's Union* case was not based on "clear and convincing" evidence appearing on the "face" of the statute, but on many extraneous factors which cannot now be used to deny review in the light of the Administrative Procedure Act.

The Court of Appeals likewise overlooked the fact (recognized explicitly by the Circuit Court in the *Trinler* case) that Congress intended in the Administrative Procedure Act to "make new law"—to extend judicial review to situations not previously provided with such review.

Expressions of Congressional leaders, apparently relied on by the Court of Appeals, stating that statutory preclusion of review is not disturbed by the Act and that certain agencies will still not be subject to review, are not in point. Some agencies are exempt from *all* provisions of the Act (Section 2(a)), while one (Senate Document 248, p. 380) is *specifically* immune from judicial review. But, as demonstrated in this brief, Congress made clear that judicial review was not "precluded" by statute in the type of case here presented. The Court of Appeals failed to comment upon any of the specific evidence of that Congressional intention.

In order to resolve the obvious and serious conflict between the decision of the Court of Appeals in this case and the decision of the Circuit Court in the *Trinler* case—a conflict which would cause serious confusion unless cleared up (as noted above, a District Court in the Second Circuit has already followed the decision of the Third Circuit Court in the *Trinler* case)—the Supreme Court should grant certiorari with respect to this matter.

CONCLUSION

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition annexed hereto, and that, upon review of the decision of the United States Court of Appeals for the District of Columbia, said decision be reversed, and the cause remanded for further proceedings consistent with the opinion of the Supreme Court.

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APPENDIX

Applicable Statutory Provisions

Administrative Procedure Act (5 U. S. C. 1001 *et seq.*)

Sec. 2. As used in this Act—

(a) Agency.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia.

* * * * *

(g) . . . "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or in-

termediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim Relief. — Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or

(6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

RAILWAY LABOR ACT (45 U. S. C. 151 *et seq.*)

Sec. 1, Fifth:

> • • • *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.

* * * * *

Sec. 2. The purposes of this Act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees • • •

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

* * * * *

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

* * * * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the require-

ments of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election.

* * * * *

Section 3, First:

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full state-

ment of the facts and all supporting data bearing upon the disputes.

* * * * *

Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section.

* * * * *

Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

* * * * *

Second . . .

(e) Within sixty days after the approval of this Act every carrier shall file with the Mediation Board a copy of each contract with its employees in effect on the 1st day of April 1934, covering rates of pay, rules, and working conditions. If no contract with any craft or class of its employees has been entered into, the carrier shall file with the Mediation Board a statement of that fact including also a statement of the rates of pay, rules and working conditions applicable in dealing with such craft or class. When any new contract is executed or change is made in an existing contract with any class or craft of its employees cover-

ing rates of pay, rules or working conditions, or in those rates of pay, rules, and working conditions of employees not covered by contract, the carrier shall file the same with the Mediation Board within thirty days after such new contract or change in existing contract has been executed or rates of pay, rules, and working conditions have been made effective.

* * * * *

Sec. 203. The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment Board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

Sec. 204. The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

* * * * *

Sec. 205. When, in the judgment of the National Mediation Board, it shall be necessary to have a permanent na-

tional board of adjustment in order to provide for the prompt and orderly settlement of disputes between said carriers by air, or any of them, and its or their employees, growing out of grievances or out of the interpretation or application of agreements between said carriers by air or any of them, and any class or classes of its or their employees, covering rates of pay, rules, or working conditions, the National Mediation Board is hereby empowered and directed, by its order duly made, published, and served, to direct the said carriers by air and such labor organizations of their employees, national in scope, as have been or may be recognized in accordance with the provisions of this Act, to select and designate four representatives who shall constitute a board which shall be known as the National Air Transport Adjustment Board. . . . From and after the organization of the National Air Transport Adjustment Board, if any system, group, or regional board of adjustment established by any carrier or carriers by air and any class or classes of its or their employees is not satisfactory to either party thereto, the said party, upon ninety days' notice to the other party, may elect to come under the jurisdiction of the National Air Transport Adjustment Board.

No. 150

IN THE

Supreme Court of the United States

October Term, 1948

J. W. KIRKLAND, H. H. GARRISON, *et al.*,
Petitioners,

—VS.—

ATLANTIC COAST LINE RAILROAD COMPANY, A VIRGINIA CORPORATION, GRAND INTERNATIONAL BROTHERHOOD OF LOCOMOTIVE ENGINEERS, AN UNINCORPORATED ASSOCIATION, NATIONAL MEDIATION BOARD, AND FRANK P. DOUGLASS,
Respondents.

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION.

The petition for writ of certiorari, and petitioners' brief in support thereof, outline a single basic issue, which is substantially as follows: Whether judicial review is available, in view of the Administrative Procedure Act (5 U.S.C. 1001 *et seq.*), with respect to a decision of the National Mediation Board which construed the Railway Labor Act (45 U.S.C. 151 *et seq.*) as requiring carrier-wide collective bargaining units in all cases and therefore grouped petitioners and other engineers on the Western Division (formerly a separate carrier) of the Atlantic Coast Line Railroad with the much larger group of engineers on the Atlantic Coast Line proper for purposes of an election to choose a single collective bargaining representative, with the result that petitioners were over-ridden and the Western Division engineers, including petitioners, were deprived of their

long-standing right to have a collective bargaining representative of their own choice.

Respondents National Mediation Board and Frank P. Douglass (hereinafter for convenience referred to collectively as the "Mediation Board"), and the Brotherhood of Locomotive Engineers ("BLE") have filed briefs seeking to support the judgment of the lower court denying judicial review. The brief of the Mediation Board discusses, sketchily and inaccurately, the issue as presented by petitioners and as acted upon by the lower court, while the brief of the BLE attempts to evade the real issue and seeks to raise entirely new issues, in substance as follows:

(1) The BLE erroneously asserts (its brief, pp. 7-12) that petitioners have failed to prove (although they so alleged in their complaint and the allegations were admitted by respondents' motions to dismiss) that the Mediation Board in fact declined to exercise its statutory discretion because it considered itself bound by its construction of the Railway Labor Act as requiring carrier-wide bargaining units in all cases, and therefore the Board must be presumed to have acted properly;

(2) The BLE erroneously asserts (its brief, pp. 12-15) that (contrary to the position of petitioners throughout this case that they desire only to free the Mediation Board from a mistaken and self-imposed restriction on its discretion) petitioners are seeking "to compel the Board to certify a unit which is less than carrier wide," and are asking for a "construction of the Railway Labor Act whereby less than carrier-wide units are mandatory," and, having manufactured that purely fictitious statement of position attributed to petitioners, the BLE seeks to refute it by pointing out that a court could not so control administrative discretion.

This reply brief will be devoted to a discussion of only a few of the points raised in the brief of the respondents, all other points having been adequately answered in petitioners' original brief.

SUMMARY OF ARGUMENT.

I.

There is no merit in the contention of the BLE that petitioners have failed to present properly the issue of the Board's failure to exercise its statutory discretion.

Petitioners specifically alleged in their complaint that the Board proceeded "upon a construction of the Railway Labor Act to the effect that all persons engaged in one type of work and employed by one carrier must be organized into one craft or class and choose one representative for collective bargaining purposes (carrier-wide representation)." Petitioners were and are prepared to prove that allegation by good and sufficient evidence. Petitioners were denied an opportunity to prove that allegation when the District Court dismissed the petition. Respondents, by filing motions to dismiss, admitted that factual allegation and are now in no position to attack the accuracy of the facts so admitted. The BLE, by its motion to dismiss, has sought to avoid a hearing in which this proof would be introduced. For purposes of this appeal, the Court should assume petitioners' allegations to be correct as admitted by respondents. In order, however, to clear up any doubt as to petitioners' ability to prove that allegation, petitioners append to this brief copies of certain documents (Supplements A, B, C and D) contained in the Board's files establishing that the Board in fact did not exercise its discretion, but erroneously held itself, as a matter of law, to be without discretion as alleged by the petitioners.

II.

There is no merit in the contention of the BLE that petitioners are seeking to control the Board's discretion and to compel the Board to certify a less-than-carrier-wide unit.

Petitioners have repeatedly pointed out (*e. g.*, Petition, pp. 4-5) that they "did not ask the trial Court to control the Board's discretion in any way," and that "The Court was asked simply to inform the Board that it has the legal power and discretion, under the Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action." Since petitioners are seeking simply to obtain *freedom of discretion* for the Board, as opposed to the Board's present belief that it has no discretion, it seems clear that this is an appropriate case for judicial review in order that the Board may be informed of the full extent of its discretion. In this view, the introductory paragraph of Section 10 of the Administrative Procedure Act, which exempts from review administrative action which is "by law committed to agency discretion," has no application to this case, since the purpose of this proceeding is to declare that the agency has discretion where it erroneously believes that it has none, and not to control the exercise of agency discretion.

Ludecke v. *Watkins*, 68 Sup. Ct. 1429 (U. S. 1948) is not germane to this issue, as in that case the agency (the President acting through the Attorney General) had exercised the discretion granted by statute, whereas here the Board has held that it has no discretion to consider less-than-carrier-wide units.

III.

There is no merit in the contention of the Mediation Board that judicial review is not available in this case.

Contrary to the assertion of the Mediation Board, the Supreme Court's language in the *Switchmen's Union* case (*Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297 (1943)) makes it clear that the Court in that case merely refused to "supply" or "infer" a right of review with respect to certification proceedings, and did not find that the Railway Labor Act "precludes" review. In so deciding, the Supreme Court relied on many factors which do

not appear on the "face" of the Railway Labor Act,—factors which cannot be considered in construing that Act under the Administrative Procedure Act. Numerous indications in the legislative history of the Administrative Procedure Act demonstrate that Congress intended to provide for review of employee representation cases, and certainly did not think that such review was "precluded" by the Railway Labor Act. Since such review is not precluded, but on the contrary was clearly contemplated by Congress in passing the Administrative Procedure Act, the decision of the Supreme Court in the *Switchmen's Union* case is not authority for denying review.

ARGUMENT.

I.

There Is No Merit in the Contention of the BLE That Petitioners Have Failed to Present Properly the Issue of the Board's Failure to Exercise Its Statutory Discretion.

The BLE, apparently realizing that it is unable to make a *substantive* answer to the contentions of petitioners, has sought to raise a *procedural* objection to the manner in which petitioners have presented their case to the Board and to the Courts. The BLE alleges that petitioners failed to obtain a ruling from the Board which will support petitioners' allegations that the Board felt bound by an erroneous interpretation of the Act and therefore refused to exercise its discretion in determining the craft or class in which petitioners were placed.

Petitioners had supposed that the proper method of *proving* that the Board declined to use its discretion would be to submit *at the trial* documents and other material showing the basis on which the Board proceeded. In that view of the proper procedure, petitioners assumed that the BLE's motion to dismiss would perform the usual function of a

general demurrer, and would admit, among other things, petitioners' allegations (R. 7) that the Board proceeded "upon a construction of the Railway Labor Act to the effect that all persons engaged in one type of work and employed by one carrier must be organized into one craft or class and choose one representative for collective bargaining purposes (carrier-wide representation)," and (R. 8) that the Board decided "that it is required by the provisions of the Railway Labor Act to combine all of the engineers employed by the A. C. L., including the Western Division, into one craft or class for representation purposes." As petitioners understood the motion to dismiss, the BLE was asserting that, even though the Board proceeded on an erroneous interpretation of the Act and therefore did not use its discretion, petitioners had not stated a cause of action.

Now it appears that the BLE is seeking to use its motion to dismiss for an entirely novel purpose—namely, to attack the accuracy of the *factual* statements contained in petitioners' complaint. Such is improper procedure on a motion to dismiss.

In adopting this unprecedented approach, the BLE relies (its brief, pp. 8-9, note 4) on certain documents not yet in the record,—documents which undoubtedly will be produced at the trial after the motions to dismiss have been overruled. The BLE asserts (*ibid.*) that this Court may take judicial notice of such documents because they are in the official files of the Board.

If the BLE is correct in its assertion as to this Court's power to take judicial notice of the Board's records, then the Court may also take judicial notice of certain additional documents, not mentioned by the BLE, which likewise are in the Board's files and which demonstrate beyond question that petitioners' allegations are true and that the Board in fact failed and declined to exercise its discretion in this case. Petitioners expect to introduce these documents in

evidence at the hearing. Whether or not the Court may judicially notice the documents to which the BLE refers in its brief, petitioners deem it appropriate to include in this brief, for whatever use the Court may see fit to make thereof, the documents from the Board's files which establish the accuracy of petitioners' allegations. Reference to such documents at this time seems necessary in view of the persistent attempt of the BLE to evade the real issue of this case by raising a doubt in the Court's mind as to the validity of petitioners' contentions and the availability of proof to support petitioners' allegations.

The documents which establish that the Board did not exercise its discretion in this case are set out in Supplements A, B, C and D to this brief. Those documents consist of:

Supplement A: Letter of October 12, 1946 addressed to National Mediation Board from D. B. Robertson, President of the Brotherhood of Locomotive Firemen and Enginemen, requesting that the Board explain its ruling with respect to craft or class in this case.

Supplement B: Letter of October 16, 1946 from Robert F. Cole, Secretary of the Mediation Board, to Mr. Robertson, acknowledging receipt of letter of October 12, 1946.

Supplement C: Letter of November 13, 1946 from Secretary Cole, "By direction of the National Mediation Board," to Mr. Robertson explaining the basis on which the Board proceeded in this case.

Supplement D: Excerpts from decision of the Board in Case No. R-690, referred to in the Board's letter of November 13, 1946.

It appears from the documents in the supplements to this brief that the Board notified (Supp. A) various parties involved in the election that "It is the Board's consistent policy in representation elections to require that all employees in a particular craft or class on a carrier are en-

titled to participate in any determination of the representative of the craft or class, for the purposes of the law." With respect to that statement, the Board was specifically asked (Supp. A) whether it meant "that when deciding whether to entertain the BLE's application, it considered itself required by law, to-wit, the Railway Labor Act, to combine all of the engineers employed by the ACL RR, including the Western Division thereof, into one craft or class, and be represented by one representative."

The Board replied (Supp. C):

> "In direct response to your inquiry as to whether the Board considers itself required by the Railway Labor Act to combine all of the engineers employed by the Atlantic Coast Line Railroad, including the Western Division thereof, into one craft or class for representation purposes, the answer is in the affirmative. In this connection you are respectfully referred to page 15 of the Findings in Case R-690 wherein reference is made to the Board's letter of February 17, 1937 to Mr. Walber of the New York Central Railroad Company, in an earlier case, R-161, as well as the specific Findings in Case R-690, copy of which is enclosed."

It should be noted that this reply was given "By direction of the National Mediation Board."

The reference in the Board's reply to the "Findings in Case R-690" is to the administrative stage of the *Switchmen's Union* case (*Switchmen's Union* v. *National Mediation Board*, 77 App. D. C. 264, 135 F. (2d) 785 (1943), *aff'd*, 320 U. S. 297 (1943)). In that case both the majority and dissenting justices in the Court of Appeals assumed that the Board's action was predicated on its interpretation of the law, not on the exercise of its administrative discretion. As the majority said (77 App. D. C. 275, 135 F. (2d) 796), the Board "determined it had no discretion to deny the request of the majority of the yardmen employed by the Railroad Company to appoint a representative for their craft."

Mr. Justice Rutledge, dissenting, stated (77 App. D. C. 281, 135 F. (2d) 802) that the Board "decided as a matter of law that the statute required carrier-wide crafts as the voting unit."

In the Supreme Court the same assumptions were made by both majority (320 U. S. 304) and dissenting (320 U. S. 311) justices, the majority holding that, in the absence of an expression from Congress (such as is supplied by the Administrative Procedure Act), no judicial review would be "supplied" or "inferred" even with respect to erroneous interpretations of law by the Board.

In this case, the Board not only has stated specifically that it "considers itself required by the Railway Labor Act to combine all of the engineers employed by the Atlantic Coast Line Railroad, including the Western Division thereof, into one craft or class for representation purposes," but it has given, as the *only* reason for that conclusion, its prior interpretation of the Act in the *Switchmen's Union* case. This makes it doubly clear that the Board acted on its erroneous interpretation of the Act, and not on any discretionary finding on the facts that a carrier-wide unit would be more appropriate in this case than any possible smaller unit. In view of this, there is no possible substance in the argument of the BLE (its brief, pp. 7-12 and footnotes) that the Board must be presumed to have exercised its discretion, and that it has selected carrier-wide units only because of considerations of "policy."

The excerpts from the Board's decision in the *Switchmen's Union* case contained in Supplement D to this brief clearly show that the Board did not exercise discretion in that case, and the Courts so assumed on review (see discussion of Courts' opinions above). Here it is even more obvious that the Board did not use the discretion given it by the statute, as the Board gives no reasons based on the facts of this case for its decision establishing a car-

rier-wide unit, but rather relies entirely on its *legal* interpretation in another case (the *Switchmen's Union* case).

The foregoing would seem to constitute sufficient answer to the novel and specious contention of the BLE that the Board must be presumed to have exercised its discretion properly.

II.

There Is No Merit in the Contention of the BLE That Petitioners Are Seeking Judicial Control of the Board's Discretion and That Therefore No Review Should Be Granted.

The persistence of the BLE in avoiding the only issue in this case as presented by petitioners and as recognized by the Court of Appeals and the respondents Mediation Board and Frank P. Douglass, is somewhat remarkable. While all other parties, and the Courts, have recognized that the issue is whether judicial review is granted by the Administrative Procedure Act to correct an erroneous statutory interpretation by the Mediation Board, or whether, on the other hand, judicial review is "precluded" by the Railway Labor Act, within the meaning of the introductory paragraph of Section 10 of the Administrative Procedure Act, the BLE refuses to discuss that issue (see its brief, pp. 14-15), but insists upon discussing non-existent issues. The only conclusion which can be drawn from that conduct on the part of the BLE is that it does not agree with the position taken by the Mediation Board and by the lower court with respect to reviewability in this case, and therefore is determined to avoid the issue completely.

The second fictitious issue advanced by the BLE is stated as follows (see its brief, pp. 12-14): "Petitioners seek, by their complaint, not to have the Board exercise a discretion as to the bargaining unit but to compel the Board to certify a unit which is less than carrier wide. In thus seeking a construction of the Railway Labor Act whereby less than

carrier-wide units are mandatory, petitioners summarize their arguments here as follows (petition 15):

> The National Mediation Board's action in placing petitioners in a carrier-wide craft or class would result in destroying a smaller collective bargaining unit which has existed for over thirty-five years, and consequently in destroying the rights of petitioners to bargain with their employer through a representative of their own choosing and to have the employer treat with that representative and with no other.

Such is the first argument in their supporting brief. Petitioners thus do not seek to have the Board exercise its discretion, or to present facts which may bear thereon, but seek instead the exact contrary."

The simple answer to that statement of the BLE is that the petitioners have taken no such position. Petitioners' position is summarized at pages 4-5 of its petition for certiorari:

> "It should be emphasized that petitioners did not ask the trial Court to control the Board's discretion in any way. The Court was not asked to order the Board to withdraw its certification of the B. L. E., to establish a separate class or craft embracing only the engineers on the Western Division of the A.C.L., or to take any other action to influence the Board's decision on the merits. The Court was asked simply to inform the Board that it has the legal power and discretion, under the Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action. Petitioners are confident that if the Board is freed of its self-imposed inhibition against the exercise of its statutory discretion in this respect, it will voluntarily correct the erroneous certification involved in this case (R. 10). Petitioners contend that they are entitled to have the Board act in the matter of certification free of any misapprehension that the Board is without discretion in making its decision."

Again, at page 19 of petitioners' brief in support of its

petition, it is pointed out: "Petitioners urged that the legislative history of the Railway Labor Act clearly shows a Congressional intention that the Board should not be restricted in any manner, geographical or otherwise, in its choice of a bargaining unit."

And again at page 20 of that brief, petitioners state:

> "Congress intended the term 'craft or class' to be flexible, both geographically and otherwise, in order that the Mediation Board could, in its discretion, certify carrier-wide or less-than-carrier-wide units as the facts of each case might require. The failure of the Board to exercise that discretion necessitates the declaratory relief here sought by petitioners. Such relief will not *require* the Board to certify any particular organization or to designate any particular bargaining unit. It will simply free the Board from the erroneously self-imposed inhibition (resulting entirely from its misconstruction of the Act) against designation of smaller units. Whether originally independent railroad segments, such as the Western Division of the A. C. L., are to be treated separately or not will depend entirely on the sound discretion of the Mediation Board exercised in the light of all the facts of each case."

Further examples of petitioners' position on the Board's discretion might be cited, but the foregoing clearly demonstrates the fallacy in the issue sought to be created by the BLE.

It is true that, in order to place the legal issue in proper focus, petitioners have assumed throughout the petition and brief that the Mediation Board's interpretation of the law was erroneous and that, if the Mediation Board were informed by the Court that it has full discretion, it would rule in favor of petitioners on the substantive issue. Obviously, such an assumption is necessary in view of the motions to dismiss and the manner in which the case was handled by the lower courts. This is explained at page 24 of petitioners' brief in support of its petition. Such assumptions certainly cannot fairly be construed as a re-

quest for a judicial direction to the Board to certify a less-than-carrier-wide bargaining unit, particularly when petitioners' position with respect to the Board's discretion is clearly stated repeatedly throughout the petition and brief.

Since petitioners in this proceeding are not seeking to interfere with the Mediation Board's exercise of discretion, but are asking merely for a declaration of the existence of a discretion now denied by the Board, there is no substance to the second and last point urged by the BLE. Judicial review is appropriately invoked to free an administrative agency from erroneously self-imposed restrictions on discretion. See *Cotonificio Bustese, S. A.* v. *Morgenthau,* 74 App. D. C. 13, 121 F. (2d) 884 (1941): "... where an administrator erroneously holds himself to be without power to consider a claim, relief in the nature of mandamus generally may be given." See also *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, 197 (1941); *National Benefit Life Ins. Co.* v. *Shaw-Walker Co.,* 71 App. D. C. 276, 286, 111 F. (2d) 497, 507 (1940).

The BLE seeks to derive comfort from the provision in Section 10 of the Administrative Procedure Act exempting from judicial review agency actions which are "by law committed to agency discretion." As demonstrated above, the Mediation Board did not exercise its statutory discretion, but on the contrary held that it had no discretion. Clearly, therefore, the quoted language from Section 10 of the Administrative Procedure Act is inapplicable. Once the Board has exercised its discretion it will be soon enough for the BLE to argue that judicial review is not available, although the history of the Administrative Procedure Act shows that the exemption of discretionary matters was intended to apply only in cases where a statute clearly confers "unlimited" discretion (Senate Document 248, pp. 212, 275, 368, 370; see *Ludecke* v. *Watkins, supra,* 68 Sup. Ct. at 1431), and did not purport to prevent judicial review of questions of law (Senate Document 248, p. 275). More-

over, it appears that the agency's exercise of discretion must be "based on sound reasoning" and cannot be "an arbitrary discretion" (Senate Document 248, p. 311). See also Senator McCarran's article, quoted at pages 32-34 of petitioners' brief, where it is pointed out that the intent and effect of the Administrative Procedure Act was to "cut down the 'cult of discretion' so far as federal law is concerned."

In any event, the Mediation Board has not yet exercised its statutory discretion and certainly the Administrative Procedure Act does not prohibit a court from declaring the existence of an administrative discretion which is denied by the agency itself. Indeed, that Act (Section 10 (e)), and the legislative history (Senate Document 248, p. 214), clearly show that courts, not agencies, are to decide all questions of law in the final analysis.

In passing, it may be observed that *Ludecke* v. *Watkins, supra,* relied upon by the BLE (its brief, p. 14), is not inconsistent with petitioners' position in this case. There the administrative discretion was exercised as authorized by the statute, and the only possible questions were whether the statute was applicable, was constitutional or actually conferred the very broad discretion there exercised. Here there is no question as to the applicability or constitutionality of any statute, and the Board did not exercise the broad discretion granted it by the statute. Clearly the Court has the power in this case to say that the Board has a broad discretion which it did not exercise, just as it said in *Ludecke* v. *Watkins, supra,* that the President had a broad discretion which he did exercise.

III.

Other Contentions of Respondents Are Without Substance.

The petitioners do not wish to burden the Court with a tedious refutation of the arguments advanced in the reply

briefs of the respondents. Those arguments, except as discussed above, were largely anticipated in the petitioners' original brief. Therefore only brief reference will be made to a few points made by respondents.

The Mediation Board relies heavily (its brief, pp. 6-7) on the fact that the original draft of the introductory clause of Section 10 of the Administrative Procedure Act excepted judicial review where "statutes expressly preclude" it, and the word "expressly" was later deleted. This argument is answered in detail at pages 34-39 of petitioners' brief, specific reference to the deletion appearing at page 37. As noted there, it may well be that the word "expressly" was deemed by Congress to be redundant, since the word "statutes" at various points in the Act was regarded as the equivalent of "express statutory provisions." In any event, Congress made clear its intention that judicial review could not be denied except where the "face" of the statute itself gives "clear and convincing evidence of an intent to withhold it" (Senate Document 248, p. 275).

Attention is also called to the quotation, at page 49 of the petitioners' brief, from the decision of the Circuit Court in *United States ex rel. Trinler* v. *Carusi*, 166 F. (2d) 457 (C.C.A. 3d, 1948), where the Court said: "The elimination of the word 'expressly' in the bill which finally became law has no significance other than to indicate that the failure of the basic statute to contain the exact words 'precludes review' is not conclusive."

The Mediation Board also relies (its brief, pp. 7-8) on an advance interpretation of the Administrative Procedure Act by the Attorney General, which is said to indicate that Section 10 did not change existing law respecting judicial review, and the Mediation Board asserts that the Attorney General's statements were uncontradicted in Congress. That argument is answered in detail at pages 43-48 of petitioners' original brief, where numerous specific statements by Congressional leaders, demonstrating their inten-

tion that judicial review should be available in this type of case, are set out. The Mediation Board has sought (its brief, p. 8, footnote 2) to brush those statements aside with the assertion that they are mere "general statements." The discussion in petitioners' brief demonstrates that those statements are most specific and pertinent to the point here in issue.

The Mediation Board also relies (its brief, pp. 8-9, footnote 2) on Senator McCarran's statement that the Administrative Procedure Act was not intended to "abrogate acts of Congress" (Senate Document 248, p. 311). The Mediation Board's argument begs the question completely, just as did the opinion of the Court of Appeals, as the question obviously is whether "statutes preclude" review where they merely fail to provide specifically for it, and where courts consequently refuse to "supply" review. If, as petitioners firmly believe, and as is demonstrated in petitioners' original brief, the Railway Labor Act does not "preclude" review, plainly the Administrative Procedure Act does not "abrogate acts of Congress" by conferring review in this case.

The Mediation Board seeks (its brief, p. 9) to derive support from the express refusal of Congress (Senate Document 248, p. 38) to exempt certification proceedings from judicial review under Section 10 of the Administrative Procedure Act. Obviously, such refusal supports the position of petitioners, as it shows that Congress desired such cases as this to be within judicial cognizance. Moreover, in refusing to exempt such proceedings, the Senate Judiciary Committee went further and stated (Senate Document 248, p. 38) that under the Administrative Procedure Act judicial review *could not be denied* unless the Courts should find that "subsequent review in enforcement proceedings is 'adequate.'" Since review in enforcement proceedings would not be "adequate" to protect the interests of petitioners (see petitioners' brief, p. 29), plainly judicial review cannot

be denied in this case in view of the Congressional mandate (see full discussion on this point in petitioners' brief, pp. 28-31).

The Mediation Board attempts (its brief, pp. 9-10) to belittle the numerous instances discussed by petitioners (petitioners' brief, pp. 43-47) in which Congressional leaders made clear their intention that the "defect" of nonreviewability disclosed in the *Switchmen's Union* case should be corrected by the Administrative Procedure Act. The Mediation Board fails to discuss most of such instances, and it erroneously contends (its brief, p. 10) that Senator McCarran's statement on the subject in response to questions of Senator Austin (Senate Document 248, p. 311) referred "only to the question of who has standing to obtain judicial review." The complete answer to that contention is contained in the colloquy between Senator McCarran and Senator Austin:

> "Mr. Austin. Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
>
> "Mr. McCarran. That is correct.
>
> "Mr. Austin. And is it not also true that, because of the situation in which we are at this moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?
>
> "Mr. McCarran. That is true; the Senator is entirely correct in his statement."

Obviously, Senator McCarran was *not* referring merely to cases which he had previously mentioned (Senate Document 248, p. 310) relating to "standing to obtain judicial review." The only cases to which he possibly could have been referring—cases where judicial review was denied "because the statute did not provide for a review"—were the *Switch-*

men's Union case, and the somewhat similar cases cited by the Attorney General (Senate Document 248, p. 230; see full discussion in petitioners' brief, pp. 43-45).

The Mediation Board states (its brief, p. 10) that Section 10 of the Administrative Procedure Act "does not purport to answer all of the detailed and often difficult questions that arise as to what is reviewable and by whom, when, and in what court. Those complexities, which have often been alluded to by this Court, e. g. *Stark* v. *Wickard*, 321 U. S. 288, 306, 312, were well known to the draftsmen of the Administrative Procedure Act." Whatever "difficult questions" may be left unanswered by Section 10, one is answered quite clearly, and Congressman Walter referred to *Stark* v. *Wickard* in emphasizing the importance of the answer. Congress has made it perfectly clear (Senate Document 248, p. 275) that, contrary to the reasoning in the *Switchmen's Union* case and in the dissent in *Stark* v. *Wickard*, "The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review," and that a statute precludes review only when, upon its "face," it gives "clear and convincing evidence of an intent to withhold it." And Congressman Walter stated (Senate Document 248, p. 368) that absence of an express provision for review "would be completely immaterial," citing with evident disapproval the dissent in *Stark* v. *Wickard*, in which the reasoning of the *Switchmen's Union* decision was advanced as a basis for denying review (see full discussion in petitioners' brief, pp. 45-46; also pp. 39-43).

The Mediation Board seeks to derive comfort (its brief, p. 11) from a most general statement by Mr. Carl McFarland, which is merely, in substance, that the "principle" and the "extent" of judicial review could and should not be "greatly altered." Such remarks could hardly be construed to oppose the position of the petitioners that the *availability* of judicial review is extended in the particular

here involved. Mr. McFarland is quoted more pointedly by petitioners (petitioners' brief, p. 34) as stating that the Administrative Procedure Act "alters the entire cast and setting of the subject" of " 'both the availability and scope of judicial review' "; and as stating (petitioners' brief, p. 38), a year after the *Switchmen's Union* decision, that "Judicial review has been forbidden by Congress in few instances including, and perhaps limited to, decisions of the Administrator of Veterans' Affairs." Moreover, as noted above, Mr. McFarland, as counsel for the BLE in this case, has declined to support (or discuss in any manner) the position of the Mediation Board that judicial review is here "precluded" within the meaning of the introductory clause of Section 10 of the Administrative Procedure Act (BLE brief, pp. 14-15).

Ludecke v. *Watkins, supra,* cited by the Mediation Board (its brief, p. 12), does not stand for the proposition that a "statutory preclusion" of judicial review may be ascertained from sources apart from "clear and convincing evidence" appearing on the "face" of the statute itself. There non-reviewability was based on the fact that Congress had conferred "unlimited" discretion—a fact appearing on the "face" of the statute. In terms of the Administrative Procedure Act, the case would more appropriately be classed as one where "agency action is by law committed to agency discretion" (see BLE brief, p. 14) than one where "statutes preclude judicial review." As noted above, the instant case is one in which the administrative agency declined to exercise its statutory discretion because it erroneously concluded that it had none. Hence *Ludecke* v. *Watkins,* where the discretion was exercised, and was not mistakenly self-inhibited, is not inconsistent with the position of petitioners herein.

With respect to the Mediation Board's contention (its brief, p. 12) that the *Switchmen's Union* decision represents a finding that judicial review is "precluded" by the Railway

Labor Act, it is sufficient to refer to the complete refutation in petitioners' original brief (pp. 24-26).

Both briefs of respondents seek to distinguish *United States ex rel. Trinler* v. *Carusi*, 166 F. (2d) 457 (C.C.A. 3d, 1948) from this case in order to avoid the conflict pointed out by petitioners in their original petition and brief (pp. 10-11, 53-55). Respondents succeed only in pointing out non-essential factual differences. Essentially the two cases are in direct conflict, as demonstrated in petitioners' brief. Indeed, in attempting to deny the conflict, the Mediation Board clearly demonstrates its existence, for the Mediation Board asserts (its brief, p. 13, footnote 4) that prior judicial interpretations of the deportation statute involved in the *Trinler* case denied review (except to the limited extent possible in habeas corpus proceedings), and therefore the Mediation Board contends that the Circuit Court should have held the broader review there sought to be "precluded" by the statute. In other words, the Mediation Board is contending for "statutory preclusion" by judicial interpretation in the *Trinler* case, just as it is in this case; and the refusal of the Circuit Court to adopt that contention establishes the conflict with the acceptance of it by the Court of Appeals in the instant case. The fact that the *Trinler* case was subsequently abated does not detract from the decision's authority as an expression of the considered opinion of a distinguished Circuit Court. As noted in petitioners' original brief (p. 51), the decision in the *Trinler* case has been followed by at least one District Court, located in another circuit. *United States ex rel. Cammarata* v. *Miller*, Civil No. 45-297 (S.D.N.Y. 1948). Clearly the purpose of this Court's rule authorizing certiorari in case of conflict between Circuit Court decisions is to avoid unnecessary confusion. This is an important matter, and confusion is certain to result unless this Court takes jurisdiction to resolve the conflict and establish boundaries as to the availability of judicial review under the Administrative Procedure Act.

CONCLUSION.

In view of the foregoing considerations, it is respectfully requested that this Court grant the writ of certiorari sought in the petition, and that, upon review of the decision of the United States Court of Appeals for the District of Columbia, said decision be reversed, and the cause remanded for further proceedings consistent with the opinion of the Supreme Court.

Respectfully submitted,

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September 15, 1948

SUPPLEMENT A.

October 12, 1946

Mr. Robert F. Cole, Secy.,
National Mediation Board,
Washington, D. C.

Dear Sir:

The well-nigh unanimous chorus of disapproval and condemnation being voiced by the engineers employed on the Western Division of the Atlantic Coast Line Railroad against the certification in case No. R-1662 of the Brotherhood of Locomotive Engineers as the "duly designated and authorized" representative of the class or craft of engineers employed on the Atlantic Coast Line Railroad Company, including the Western Division thereof, compels me to formally protest against, and except to, this certification by the Board.

The impropriety of the Board's action, when regard is had for the circumstances of this certification, is so apparent that I desire to assure myself regarding the basis for this action.

Shortly prior to April 30, 1946, the BLE invoked the services of the Board for the purpose of investigating an alleged representation dispute among the locomotive engineers employed by the Atlantic Coast Line Railroad, including the Western Division. I am advised that the authorizations filed by the BLE with the Board in support of the alleged dispute were executed by the engineers employed on the Northern and Southern Divisions only of the ACL RR. The engineers employed on the Western Division lent no support to the claim that a dispute existed regarding their choice of a representative.

In the Board's letter of April 30, 1946, addressed to Mr. W. S. Baker, Chief of Personnel of the ACL RR, and to myself, the Board formally acknowledged receipt of the BLE's application, and then followed this acknowledgment by an explanation which reads as follows:

> "Records of the Board show that all locomotive engineers of the Atlantic Coast Line are presently represented by the Brotherhood of Locomotive Engineers

with the exception of the Western Division which, prior to January 1, 1946, was the Atlanta, Birmingham & Coast Railroad. It is the Board's consistent policy in representation elections to require that all employees in a particular craft or class on a carrier are entitled to participate in any determination of the representative of the craft or class, for the purposes of the law."

I understand the Board to say by this statement that when deciding whether to entertain the BLE's application, it considered itself required by law, to-wit, the Railway Labor Act, to combine all of the engineers employed by the ACL RR, including the Western Division thereof, into one craft or class, and be represented by one representative.

It is reasonable to assume that the Board is prepared to explain and justify its actions in any performance of its duties under the Railway Labor Act, and I accordingly ask to be favored by a clear statement from the Board whether my understanding of the reason for the Board entertaining the BLE's application, as set forth in the second paragraph of the Board's letter of April 30, 1946, is correct. If my understanding is in error in any respect, I shall, of course, wish to be put at rights.

Very truly yours,

D. B. Robertson /s/

SCP:CG

SUPPLEMENT B.

October 16, 1946

Mr. D. B. Robertson, President,
Brotherhood of Locomotive Firemen and Enginemen,
Cleveland, Ohio.

Dear Mr. Robertson:

This will acknowledge your letter of October 12, 1946, requesting a statement from the Mediation Board of the reasons for combining all of the engineers employed by the Atlantic Coast Line Railroad Company, including the Western Division thereof, into one craft or class for pur-

poses of representation under the Railway Labor Act as certified by this Board on August 27, 1946, Case R-1662. Your letter will be called to the Board's attention.

Very truly yours,

Robt. F. Cole /s/
Robert F. Cole,
Secretary,
National Mediation Board.

SUPPLEMENT C.

NATIONAL MEDIATION BOARD
Washington 25, D. C.

November 13, 1946
Case R-1662

Mr. D. B. Robertson, President
Brotherhood of Locomotive Firemen & Enginemen
Cleveland, Ohio

Dear Mr. Robertson:

Further reference is made to your letter of October 12, 1946, Case R-1662, representation dispute among locomotive engineers employed on the Atlantic Coast Line Railroad Company, including the Western Division thereof (formerly the Atlanta, Birmingham & Coast Railroad).

Your letter was considered by the Board in executive session today and this letter is written to advise that the statement contained in our joint letter of April 30, 1946, addressed to the carrier and yourself, as quoted in your letter, is correct and is based on prior decisions of this Board.

In direct response to your inquiry as to whether the Board considers itself required by the Railway Labor Act to combine all of the engineers employed by the Atlantic Coast Line Railroad, including the Western Division thereof, into one craft or class for representation purposes, the answer is in the affirmative. In this connection you are respectfully referred to page 15 of the Findings in Case R-690 wherein reference is made to the Board's letter of

February 17, 1937 to Mr. Walber of the New York Central Railroad Company, in an earlier case, R-161, as well as the specific Findings in Case R-690, copy of which is enclosed.

By direction of the NATIONAL MEDIATION BOARD.

Robt. F. Cole /s/
Robert F. Cole
Secretary

Enclosure

SUPPLEMENT D.

Excerpts from Decision of National Mediation Board in Case No. R-690.

(Representation of Employees of the New York Central RR Co. May 27, 1941)

(This case is that referred to by the Mediation Board in its letter of November 13, 1946 (Supp. C), and formed the basis for the Court decisions in *Switchmen's Union of North America v. National Mediation Board*, 77 App. D. C. 264, 135 F. (2d) 785 (1943); 320 U. S. 297 (1943))

(Mediation Board's mimeographed decision, page 2):

"ISSUES

"The Trainmen contend that the various lines of roads constituting the Railroad Company are not separate and independent operating units or carriers as they were before becoming consolidated under the Railroad Company, but that such lines now constitute a single carrier, managed under a plan of consolidation by the Railroad Company, effected by acquisition thru leases of the properties or by purchase of the capital stock of the companies owning the separate lines of road concerned and the integration of these separate properties and roads into a single railway transportation system controlled and operated by the Railroad Company; that this system as a whole is a single 'carrier' within the meaning of the Railway Labor Act; and that, in view of Sections 1, Sixth, and 2, Fourth

and Ninth of the Act, the Board is bound to include in the eligible list all the employees of a craft or class of such a carrier for the purpose of determining their representative.

"The Switchmen contend that various separate properties or lines operated by the Railroad Company are separate carriers for the purpose of representation within the meaning of the Railway Labor Act; that the Act permits the Board, in its discretion, to divide a 'carrier' into geographical areas, separate lines, or regions and that the employees embraced within a class or craft in the service of the Railroad Company of each such line or region constitute separate crafts or classes of employees for purpose of representation."

(Mediation Board's mimeographed decision, pages 15-16):

"With reference to the argument of the Switchmen based on the issuing of certificates of representation applying only to the employees in the service of a particular territorial division, region or part of the Railroad Company, the Board must again direct attention to the circumstances that in those cases [certain cases previously cited by the Board] eligible lists had been agreed upon between the contending parties. In none of these cases was there a controversy over the issue of law as now raised in this case.

"Indeed with reference to the New York Central Railroad Company itself in answer to a letter of Mr. Walber, with reference to Case R-161, the Board wrote as of February 17, 1937, as follows:

'It has been the view of the Board that where a dispute exists within a class or craft, the law gives us no discretion, but to make a determination of choice of representative for the entire class or craft for the entire railroad involved regardless of presently existing agreements, unless all parties to the present dispute agreed otherwise. The controlling ruling in this regard was made in the Nickel Plate case where the Switchmen's Union of North America sought to take over the representation of the men employed in the Buffalo and Cleveland yards. I am

attaching a copy of our ruling in that matter. Of course, all the parties can agree to divide up the System for the purpose of separate agreements but if any one dissents from that view the determination must be made for the entire group and the entire System.'

"As the Board views the subject under consideration, it feels bound to conclude that no issue has been raised in this case as to what is a craft or class under the Railway Labor Act. There is no dispute that the class or craft of 'yardmen' embraces foremen or conductors, helpers or brakemen, switchtenders and car retarder operators. The issue actually raised is simply a question as to whether this craft or class of 'yardmen' may be broken into separate groups on the Railroad Company with a resulting right in any group to demand separate group representation. In the two court cases referred to (B.R.T. vs. National Mediation Board, 88 Fed. (2) 757, and Brotherhood of Railway & Steamship Clerks, etc. v. Nashville, Chattanooga & St. Louis R. R. Co., 94 Fed. (2) 97), the question before the Courts involved the subject of what constituted a class or craft but did not involve the splitting of a well-recognized craft or class of employees essentially along geographical lines; i.e., by yards, divisions, subsidiary roads or companies, or regions of a parent operating company.

"In further elaboration of its opinion on the subject as given in the First Annual Report, the Board is of the view that the idea of collective bargaining with a carrier denotes the collective participation of all the carrier's employees included in a single craft or class in its negotiations with the carrier by the method of representation. The word "collective" denotes singleness of agency in the same sense as the phrase 'e pluribus unum' symbolizes the national unity of the States. It connotes not a part or parts of a subject but a collection of all the parts into one body, which applied in the case before us, means singleness of representation with a single carrier. On this point the Act seems literally definite as it reads:

'The majority of any craft or class of employees shall have the right to determine who shall be the

representative of the craft or class for the purposes of the Act.'

"Note that the Act speaks of a majority of a craft or class determining 'who shall be the representative,' (not the representatives). The subjects 'craft or class' and 'representative' are both given in the singular number.

"The Board does not undertake to discuss the relative advantages or disadvantages which may inhere in single or divided representation respectively. Doubtless serious arguments may be made both for and against each method. The Act leaves the Board in no doubt that Congress had in mind single representation for each craft or class on each carrier when enacting it; and that had the Congress thought of sub-divisions of a craft or class or of a carrier as desirable methods of representation it would have made provision for their use.

"Finally, the Board concludes as a matter of law that the Railway Labor Act vests the Board with no discretion to split a single carrier or combine two or more carriers for the purpose of determining who shall be eligible to vote for a representative of a craft or class of employees under Section 2, Ninth, of the Act, and the argument that it has such power fails to furnish any basis of law for such administrative discretion.

"CONCLUSION

"The National Mediation Board, in view of all the evidence before it and the arguments presented to it in this case, has reached the conclusion that, since the New York Central Railroad Company and all of its operated subsidiaries, including the Boston & Albany Railroad Company, the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, the Michigan Central Railroad Company, and the Toledo and Ohio Central Railway Company, is a single carrier within the meaning of and subject to the Interstate Commerce Act as established by the Interstate Commerce Commission, and so also constitutes a single carrier for the purposes of the Railway Labor Act, all of the employees of any

given craft or class, such as yardmen, in the service of a carrier so determined must therefore be taken together as constituting the proper basis for determining their representation in conformity with Section 2, Ninth, of the Railway Labor Act."

INDEX

CITATIONS

IN THE

Supreme Court of the United States

October Term, 1948

No. 150

J. W. KIRKLAND ET AL., *Petitioners*

v.

ATLANTIC COAST LINE RAILROAD COMPANY ET AL.

On Petition For Writ of Certiorari to the United States Court of Appeals For the District of Columbia

BRIEF FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 17-18) is reported at 167 F. 2d 529. The District Court of the United States for the District of Columbia rendered no opinion in connection with its judgment, order, and decree dismissing petitioners' complaint (R. 16).

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1948 (R. 19). Petition for writ of certiorari was filed July 12, 1948. Jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. 347).

QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to determine whether the district court should have taken jurisdiction to review an order of the National Mediation Board to determine an issue (respecting the proper collective bargaining unit on a railroad) which was not first presented to or acted on by the administrative agency and hence in any event is not subject to judicial review.

2. Whether, respecting the predominantly discretionary administrative certification of a collective bargaining unit under the Railway Labor Act, this Court should grant certiorari to determine whether the court below should have held that judicial review is conferred by the Administrative Procedure Act notwithstanding the provision thereof that such review does not extend to administrative action (a) which is "by law committed to agency discretion" or (b) in which "statutes preclude judicial review".

STATUTES INVOLVED

Section 2, Ninth, of the Railway Labor Act as amended by the Act of June 21, 1943, 48 Stat. 1186, 45 U. S. C. 152, provides in part:

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party

> to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. * * * In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election * * *

Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U. S. C. 1009, makes certain provisions respecting the judicial review of acts of administrative agencies

> except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion * * *

The foregoing exceptions are contained in the introductory clause of section 10 as a limitation upon all that follows respecting judicial review. Similarly, section 10(e) of the same statute, entitled "scope of review", provides that (emphasis supplied):

> So far as *necessary to decision and when presented* the reviewing court shall decide all relevant questions of law * * * and set aside agency action * * * found to be * * * an abuse of discretion, or otherwise not in accordance with law * * * In making the foregoing determinations * * * due account shall be taken of the rule of prejudicial error.

Other provisions of the Act are involved only incidentally if at all.

STATEMENT

The complaint herein, for declaratory judgment, was brought by certain engineers of the Western Division of the Atlantic Coast Line Railroad Company (complaint ¶ 1, R. 2) against the railroad (*id.* ¶ 2, R. 2), the Brotherhood of

Engineers (*id.* ¶ 3, R. 3), the National Mediation Board (*id.* ¶ 4, R. 3), and the latter's chairman (*id.* ¶ 5, R. 3).

The pleaded facts are: The present Western Division of the Atlantic Coast Line was once a separate carrier but in 1926 Atlantic Coast Line acquired its common stock (*id.* ¶ 7, R. 3-4) and operated it as a separate entity save for certain common officers and managing personnel (*id.* ¶ 8, R. 4). However, as of January 1, 1946, the Atlantic Coast Line acquired the property and franchises outright (*id.* ¶ 9, R. 4), which it thereafter operated as its Western Division (*id.* ¶ 10, R. 4-5). The engineers of what is now the Western Division of Atlantic Coast Line had previously been a unit for collective bargaining and in 1940 the Brotherhood of Firemen and Enginemen had been certified by the Board as their representative for that purpose (*id.* ¶ 11, R. 5). That representative negotiated agreements with the employer (*id.* ¶ 12, R. 5), which included the establishment of seniority rights (*id.* ¶ 13, R. 5-6). Prior to the consolidation of the properties the Brotherhood of Engineers represented the engineers of Atlantic Coast Line as it then was (id. ¶ 14, R. 6).

From January to August 1946 there were 913 engineers on the Atlantic Coast Line, and there were 95 on its Western Division after January 1, 1946 (*id.* ¶ 15, R. 6). In April 1946 the Brotherhood of Engineers sought the action of the Board to determine the proper representative of all the engineers of the Atlantic Coast Line (*id.* ¶ 16, R. 6). It presented authorizations from a majority of the engineers other than those of the Western Division (*id.* ¶ 17, R. 6). The Board held an election among all of the engineers of the Atlantic Coast Line including the Western Division, a majority of those participating voted for the Brotherhood of Engineers as their representative, and the Board so certified (*id.* ¶ 20, R. 7-8).

Petitioners apprehended that the Brotherhood of Engineers would by new agreements with the carrier supersede

existing agreements on its Western Division and deprive engineers there of important contractual rights and concessions (*id.* ¶ 22, R. 8; ¶ 25 (3), R. 9). Hence they sought declaratory or other relief (*id.* ¶ 25, R. 9; prayer (4), R. 10). Such relief they predicated upon the Railway Labor Act, the Administrative Procedure Act, the Federal Declaratory Judgment Act, and the general equity jurisdiction of the district court (*id.* ¶ 6, R. 3).

Respondents all moved to dismiss (R. 14-15). The district court granted the motions and dismissed the complaint (R. 16). The Court of Appeals affirmed (R. 17-18).

ARGUMENT

By their complaint petitioners presented to the trial court three grounds for relief: *First*, they maintained that there was no "dispute" such as would give the National Mediation Board jurisdiction (complaint ¶ 18, R. 7; ¶ 23, R. 9). This contention was abandoned in the Court of Appeals and is not mentioned by petitioners here.[1] *Second*, the complaint alleged that the Railway Labor Act guaranteed the engineers of the Western Division the right to determine separately their own bargaining representative irrespective of what the remaining engineers of the Atlantic Coast Line might wish or do. Although not stated here as a question presented nor specified as an error to be urged (petition 6, 15), this question is pleaded, discussed

[1] In *Switchmen's Union of N. America* v. *National M. Board*, 77 U. S. App. D. C. 264, 135 F. 2d 785 (1943), the court had before it a case in which the Brotherhood of Trainmen successfully invoked the Board's services to determine whether it (rather than the Switchmen's Union) represented yardmen on the entire New York Central system. The majority of the court found it unnecessary to discuss whether this was not a sufficient "dispute", but the dissenting justice did so (p. 797). This Court mentioned the facts (320 U. S. 297 at 299). Petitioners' pleading here is carefully drawn to deny only dispute among engineers of the Atlantic Coast Line "excluding the Western Division" on the one hand or among the engineers of the Western Division on the other hand (¶ 18 and ¶ 23, R. 7 and 9), thus omitting any reference to lack of dispute between the engineers of the Western Division on the one hand and the remaining engineers of the Line on the other. It was this latter issue which the Board stepped in to settle.

in petitioners' brief, and will be treated below. *Third*, petitioners parenthetically alleged, and argue here as they did below, that the Board wrongfully interpreted the Railway Labor Act to require "carrier-wide" bargaining units in all cases under all circumstances as a mandatory matter.

The question sought to be presented by petitioners for the decision of this Court is (petition 6):

> Whether the District Court, by reason of the Administrative Procedure Act, has jurisdiction to review erroneous interpretations of the Railway Labor Act by the National Mediation Board * * *

But this Court has held that questions of reviewability should not be decided in the absence of some showing that the administrative agency has acted unlawfully. *Inland Empire Council* v. *Millis*, 325 U. S. 697, 700. The substantive question underlying the jurisdictional issue stated by petitioners is founded on their complaint here and in the Court of Appeals that (petition 5):

> The [trial] Court was asked simply to inform the [National Mediation] Board that it has the legal power and discretion, under the [Railway Labor] Act, to establish less-than-carrier-wide crafts or classes in cases where it finds that the facts warrant such action.

It is the failure of the trial court and of the Court of Appeals to consider that issue which prompts the petition for writ of certiorari (petition 4-5, 20).

It is the position of the private respondents here that the issue thus sought to be presented by petitioners is without substance, and does not call for an exercise of this Court's power of supervision, for two reasons: (1) No such issue was presented to the administrative agency and hence it may not be reviewed. (2) The question nevertheless answered by the court below, apart from its hypothetical nature, is not in conflict with any other circuit, with any decision of this Court, or with the Administrative Procedure Act and is not of importance in the circumstances.

Before discussing those matters, however, it is to be noted that petitioners' claim of the existence of a conflict between circuits (petition 10-11, 49-50) is unfounded. *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457 (CCA 3) involved two quite different issues. One was whether a deportation order was "ripe for review" after issuance but before the deportee was taken into custody (p. 459). The other was whether the provision of the Immigration Act to the effect that "the decision of the Attorney General shall be final" had the effect of "precluding" judicial review under the Administrative Procedure Act (p. 460-461). There are no such issues here. Moreover, there could in any event be no conflict with the present case because on July 8, 1948, the judgment in the *Trinler* case was vacated for the failure of the plaintiff to substitute the proper defendant upon a change in the office of Commissioner of Immigration.

1. **The Underlying Issue Which Petitioners Seek to Have Made Subject to Judicial Review Was Not Presented to the Administrative Agency and Consequently Is Not Reviewable.**—Petitioners' entire case revolves about the issue involved in a prior litigation on other facts between other parties in *Switchmen's Union* v. *Board*, 320 U. S. 297, 77 U. S. App. D. C. 264, 135 F. 2d 785. But administrative decisions in one case do not carry forward to control future cases on points of law or fact. *Communications Comm'n* v. *WOKO*, 329 U. S. 223, 227-228; and see *Trade Comm'n* v. *Raladam*, 316 U. S. 149, 152-153. And an administrative order does not become suspect merely because it is challenged. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 602. It was essential for petitioners to make their case before the primary and exclusive administrative tribunal[2] of first and necessary resort.[3] *Unem-*

[2] The contrary is held to be "wholly inconsistent with the administrative power conferred upon the" admin'strative agency legislatively designated. *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 440-441. For the consistent application of the rule see *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134, 138 *et seq.*; *Smith* v. *Hoboken R. Co.*, 328 U. S. 123, 128-129; *Illinois Comm'n* v. *Thomson*, 318 U. S.

ployment Comm'n v. *Aragon*, 329 U. S. 143, 155. That they did not do. Consequently their issue raised in court for the first time comes too late. *Labor Board* v. *Cheney Lumber Co.*, 327 U. S. 385, 387-388.

The record here shows no issue presented to, made before, or acted upon by the Board in this case. There is only a parenthetical assumption in the complaint that the Board, "proceeding upon a construction of the Railway Labor Act to the effect that all persons engaged in one type of work and employed by one carrier must be organized into one craft or class and choose one representative for collective bargaining purposes", issued an unlawful order (complaint ¶ 20, R. 7; ¶ 21, R. 8; and see prayer (1), R. 10). No decision of the Board to that effect is pleaded. None exists for the reason that no such issue was made in the administrative proceedings.[4] That petitioners

675, 686; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 404; *St. Louis, etc. Ry.* v. *Brownsville Dist.*, 304 U. S. 295, 301; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 343 *et seq.*; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 513-515; *Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 311.

[3] The fatal defect of failure to present the issue to the administrative agency extends to all questions. *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 343, 345-346. See also *Hormel* v. *Helvering*, 312 U. S. 552, 556; *General Utilities* v. *Helvering*, 296 U. S. 200, 206; *Helvering* v. *Tex-Penn Co.*, 300 U. S. 481, 498; *Helvering* v. *Cement Investors*, 316 U. S. 527, 535; *Hurlburd* v. *Commissioner*, 296 U. S. 300, 306.

[4] Petitioners admit that the Brotherhood of Engineers filed its request for a determination of the bargaining representative of the railroad. Complaint ¶ 16, R. 6. The Board in the usual course thereupon held the election and made the certification. *Id.* ¶ 20, R. 7-8. That the outcome was a "foregone conclusion" (*id.* ¶ 19, R. 7) is an afterthought of petitioners, for there is no pleading and no intimation that they made any protest at that time nor that they attempted to show facts and circumstances requiring or making appropriate a less than carrier-wide bargaining representative in this particular case.

Here the administrative documents, conspicuously absent from the pleading, are few and simple. "Application for Investigation of Representation Dispute" was made on Board form April 29, 1946. After presentation of authorizations made out by engineers to the Brotherhood of Engineers, the Board issued its mimeographed "Notice of Election" dated July 6, 1946, setting out at length the terms and conditions thereof. The formal "Report of Election Results" is dated August 19, 1946. The Board's one-page certification, dated August 27, 1946, Case No. R-1662, is entitled "In the Matter of Representation of Employees of the Atlantic Coast Line Locomotive Engineers", recites the prior representation of

"promptly protested said certification to the National Mediation Board, but without avail" (complaint ¶ 20, R. 8) is immaterial in the absence of any showing, or tender of showing, of facts warranting a contrary result and in the absence of a statement of even the grounds of protest. *Marshall Field & Co.* v. *Board,* 318 U. S. 253, 255-256; *Panhandle Co.* v. *Power Comm'n,* 324 U. S. 635, 645, 649. In these circumstances the usual presumption of validity of official action governs.[5]

Nor may petitioners complain that the Board has proceeded upon a policy of certifying carrier-wide bargaining units and representatives. An administrative agency may adopt a policy within the scope of its admitted powers, leaving it to the parties in any particular case to assume the burden of showing unusual circumstances requiring a relaxation thereof in the specific case. *Republic Aviation Corp.* v. *Board,* 324 U. S. 793, 803-804. Here, as in the *Republic Aviation* case, the Board had properly stated its legitimate views.[6] Exceptions have been made to the car-

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the engineers on the Western Division and of those on the remainder of the railroad, gives the election results in figures, and certifies "that the Brotherhood of Locomotive Engineers has been duly designated and authorized to represent the craft or class of locomotive engineers employed on the Atlantic Coast Line Railroad Company, including the Western Division thereof, for the purposes of the Railway Labor Act." These are not only official records but public documents of which this Court may take judicial notice. *Underhill* v. *Hernandez,* 168 U. S. 250, 253; *Jones* v. *United States,* 137 U. S. 202, 216.

[5] *Stearns Co.* v. *United States,* 291 U. S. 54, 63; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 190; *United States* v. *Shrewsbury,* 23 Wall. 508, 517; *Butler* v. *Maples,* 9 Wall. 766, 777-778; *Wilkes* v. *Dinsman,* 7 How. 89, 130; *Philadelphia & Trenton Railroad Co.* v. *Stimpson,* 14 Pet. 448, 458-459; *Delassus* v. *United States,* 9 Pet. 117, 134.

[6] In August 1940 the Board issued "*The Railway Labor Act and the National Mediation Board*", an elaborate statement of its policies and practices. There it said: "So far as possible the Board has followed the past practice of the employees in grouping themselves for representation purposes and of the carriers in making agreements with such representatives." P. 15. "Pressure on the Board to split classes of employees hitherto considered as a unit into more and more and smaller and smaller groups, each of which is claimed to be a distinct craft, has come from all branches of employment." Pp. 15-16. "On the basis of its experience in dealing with these problems, the Board is impressed that the tendency to divide and further subdivide established and recognized crafts or classes of employees has already gone too far, and

rier-wide-bargaining-unit policy.[7] Moreover, this Court in the *Switchmen's* case plainly indicated that in the certification of bargaining units the Board had necessary authority to interpret the meaning of "craft" and its authorization of less than carrier-wide coverage would not be subject to judicial revision.[8] Hence, at least in the absence of a

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threatens to defeat the main purposes of the Railway Labor Act, namely the making and maintaining of agreements covering rates of pay, rules, and working conditions and the avoidance of labor disputes." P. 16. "Question arose when the Switchmen's Union of North America petitioned for a vote for representation of yard-service employees of the Nickle Plate Railroad at Buffalo and Cleveland, but not the rest of the yards of the carrier. The Board rejected the petition on the ground that all the yards of a carrier must vote together to choose representatives." P. 16. "The Board has ruled generally that where a subsidiary corporation reports separately to the Interstate Commerce Commission, and keeps its own pay roll and seniority rosters, it is a carrier as defined in the act, and its employees are entitled to representation separate from other carriers who may be connected with the same transportation system. If the operations of a subsidiary are jointly managed with operations of other carriers and the employees have also been merged and are subject to the direction of a single management, then the larger unit of management is taken to be the carrier rather than the individual subsidiary companies." P. 17. These statements do not indicate that the Board regards itself as irrevocably bound to any hard and fast rule. That it may issue such a statement, and that courts must take due account of it, is established not only by the *Republic Aviation* case cited in the text but by *Skidmore* v. *Swift & Co.*, 323 U. S. 134. Should the Court be in doubt it may resort to the device employed in *A. T. & T. Co.* v. *United States*, 299 U. S. 232. There the issue was whether an administrative rule would operate in an "arbitrary fashion" (p. 240). To make certain, the Court there called upon the administrative agency to file statements of its position, which the Court accepted as binding (p. 241).

[7] Bargaining representatives do not include foreign based employees of either railroads or air carriers. For a decision respecting the former, see the certification of January 28, 1946, in Case No. R-1551, *In the Matter of Representation of Employees of the Canadian Pacific Railway Co., Eastern Lines in New England, Road Conductors.* For the policy respecting air carriers, which are governed by the same statute, see the opinion of the Assistant Solicitor General to the Board's chairman dated December 13, 1946. For a Board discussion of the problem in a specific case subsequent to the *Switchmen's* litigation, see the Boards' opinion, *Determination of Craft or Class*, Case No. R-1625, *In the Matter of Representation of Employees of the Pullman Company*, dated September 30, 1946.

[8] In the *Switchmen's* case the majority in the court below held the issue to be whether the Railway Labor Act "empowered" the Board to treat an entire carrier as a unit for collective bargaining purposes. 135 F. 2d at 787. The majority ruled that it was "in the discretion of the Board whether or not to consider an organization operated and managed in the manner of the Railroad Company a single carrier for the purposes of the Act." Pp. 791, 796. The dissenting justice, similarly, was of

proper contrary showing related to the case at hand, it is to be assumed that the Board followed the law and those decisions respecting its authority. Cf. *Miguel* v. *McCarl,* 291 U. S. 442, 456.

Should any court attempt to decide the underlying issue in these circumstances, it must proceed largely in the dark as to what the Board might have done had the issue been before it. On a trial it would be improper to attempt to probe the mental processes of the Board members. Cf. *Morgan* v. *United States,* 313 U. S. 409, 422. The sole record which would be permitted is that which was before the Board. Cf. *Cox* v. *United States,* 332 U. S. 442, 453-455. But, as set forth above, that record contains nothing upon which the action of the Board may be impeached in this case. Even if this Court should desire to reconsider its opinion in the *Switchmen's* case or the application of the Administrative Procedure Act, the hypothetical issue pre-

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the view that "Congress was as far from commanding that all less than carrier-wide units be ousted as it was from concreting all units in the contract mold of 1934." P. 797. "The language of the Act places no geographic or regional requirement or limitation upon the Board's power, except that the unit must be confined to a carrier's employees." P. 800. "The Board's decision might be for a carrier-wide craft or class or for one less extensive, depending upon the case made." P. 802. His point of dissent was that the Board *in that case* "decided as a matter of law that the statute requires carrier-wide crafts as the voting unit" and therefore "failed to exercise the judgment which the statute calls into play". P. 800.

The same situation prevailed as to the dissenting justices when the case reached this Court. They felt that the Board had failed to exercise its discretion (320 U. S. at 321) because its opinion *in that case* stated that the "Act vests the Board with no discretion to split a single carrier * * * and the argument that it has such power fails to furnish any basis of law for such administrative discretion" (*id.* at 309). But the majority, although it stated that it did "not reach the merits" (*id.* at 300), held that "the authority of the Mediation Board in election disputes to interpret the meaning of 'craft' as used in the statute is * * * clear and * * * essential to the performance of its duty" (*id.* at 305). Hence, whatever may be said as to the propriety of the particular disposition made of the cause in that case, the Board was plainly informed of its authority not only in the language last quoted but by the decision of the majority of this Court to the effect that its interpretations were beyond judicial review. The Board so understood. *Tenth Annual Report* (1944), p. 4.

sented here would be a poor vehicle for the purpose.[9] Cf. *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 722 *et seq.*

2. The Jurisdictional Question Stated by Petitioners Was Rightly Decided by the Court Below and Presents No Matter of Substance Upon Which Review by This Court Should Be Had.—The decision below is simply that, since this Court had previously in the *Switchmen's* case held the Railway Labor Act to withhold judicial review of such an issue as was presented by the complaint in this case, such withholding was not disturbed by the subsequent adoption of the Administrative Procedure Act because section 10 of the latter exempts from its judicial review provisions matters in which "statutes preclude judicial review" or in which "agency action is by law committed to agency discretion" (R. 17-18). That brief per curiam decision does not discuss the issues or the facts. The latter leave no room for any other result under the Administrative Procedure Act or otherwise pursuant to the settled course of judicial proceedings.

Petitioners seek, by their complaint, not to have the Board exercise a discretion as to the bargaining unit but to compel the Board to certify a unit which is less than car-

[9] So far as the Administrative Procedure Act is concerned, it negatives judicial review in these circumstances. Section 10 (e) contemplates judicial review of only such issues as are "necessary to decision and when presented", and provides that account shall be taken whether the alleged error is prejudicial. Almost every section of the Act makes some provision looking to the application of law to specific cases rather than to hypothetical issues. Congress recognized that, in the specific case, "findings must in the first instance be made by the agency concerned". *Legislative History of the Administrative Procedure Act*, Senate Document No. 248, 79th Congress, pp. 217, 279. Requirements "must, to be sure, be interpreted and applied by agencies affected by them in the first instance". *Id.* 278. The second part of the introductory clause of section 10, respecting judicial review, exempts from the whole section administrative action which "is by law committed to agency discretion", although section 10(e) lists "abuse of discretion" as a reviewable issue. But there is no basis in this case upon which a reviewing court may find an abuse of discretion, for the reasons stated above.

rier wide.[10] In thus seeking a construction of the Railway Labor Act whereby less than carrier-wide units are mandatory, petitioners summarize their argument here as follows (petition 15):

> The National Mediation Board's action in placing petitioners in a carrier-wide craft or class would result in destroying a smaller collective bargaining unit which has existed for over thirty-five years, and consequently in destroying the rights of petitioners to bargain with their employer through a representative of their own choosing and to have the employer treat with that representative and with no other.

Such is the first argument in their supporting brief.[11] Petitioners thus do not seek to have the Board exercise its discretion, or to present facts which may bear thereon, but

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[10] Petitioners' basic complaint is that the initiation of the certification proceedings by the Brotherhood of Engineers was designed to deprive the engineers of the Western Division of the Atlantic Coast Line "of the right to organize and bargain collectively" separate from the remainder of the craft or class serving the carrier (complaint ¶ 19, R. 7). They ask that the Board's action be declared wholly unauthorized by the statute (*id.* ¶ 25(2), R. 9). Because, they allege, a majority of the engineers on the Western Division "have the right under sec. 2, Fourth, of the Railway Labor Act, to determine who shall be their representative for the purposes of this Act", do not desire to be represented by the Brotherhood of Engineers, and decline to accept the latter as their representative (*id.* ¶ 24, R. 9; ¶ 25(1) and (2), R. 9; ¶ 21, R. 8). In that connection the only facts pleaded are the consolidation of two carriers (complaint ¶ 9, R. 4) and the subsequent certification of a single collective bargaining agent for the resulting single railroad (*id.* ¶ 20, R. 7-8) in the place of two different bargaining agents theretofore (*id.* ¶ 11, R. 5; ¶ 14, R. 6).

[11] The subject of petitioners' first argument in their supporting brief is (petition 18): "Declaratory relief is necessary in order to protect petitioners' rights under the Railway Labor Act to select their own bargaining representative and to bargain collectively through such representative." Their argument is that (*id.* 20), "If the decision of the Mediation Board were allowed to stand, the craft or class units under the Railway Labor Act would be subject to control, not by employees as intended by Congress, but by change in ownership over which the employees have no control." Again they say (*id.* 21), "Placing petitioners in an inappropriate bargaining unit would be perhaps the most effective possible way of depriving them of their statutory right to choose their own representative and bargain collectively through such representative." Merely by virtue of the pleaded facts (*id.* 22), "Petitioners firmly believe that the Board has placed them in an inappropriate bargaining unit and thereby deprived them of the many valuable rights outlined briefly above, including their right to choose their own representative and to bargain with their employer. Petitioners further believe that the Court has full power to grant the relief here sought."

seek instead the exact contrary.[12] This Court has held that the measure of an appropriate bargaining unit is a matter which "involves of necessity a large amount of informed discretion and the decision of the Board, if not final, is rarely to be disturbed." *Packard Co.* v. *Labor Board,* 330 U. S. 485, 491. The Administrative Procedure Act does not intervene to confer judicial review in that situation but, on the contrary, expressly exempts from judicial review administrative action which is "by law committed to agency discretion" (section 10, introductory clause). Consequently the Act confirms and requires, in the present case at least, that the complaint should be dismissed. The district court rightly did so, the Court of Appeals correctly affirmed, and no possible occasion is presented for review by this Court. That such is the proper result in matters of discretion notwithstanding the Administrative Procedure Act has, indeed, lately been stated by this Court. *Ludeke* v. *Watkins,* No. 723, decided June 21, 1948.

Petitioners argue at great length that the present situation does not fall within that provision of section 10 of the Administrative Procedure Act which excludes from judicial review matters in which "statutes preclude judicial review" (petition 6-10, 23-53). But, since the issue here is one of discretion which the Administrative Procedure Act in any event exempts from judicial review, it is unnecessary to explore whether the present case is not also exempt from judicial review under that Act by virtue of its further exclusion of matters in which "statutes preclude review" (section 10, introductory clause). In short, since one clause

[12] It is true that petitioners mention the very different question of the Board's alleged failure to exercise its admitted discretion (petition 5, also quoted in the text *supra*), erroneously state that respondents have contended for mandatory carrier-wide units in this court proceeding (*id.* 18), and maintain in their supporting brief that "the failure of the Board to exercise [its] discretion necessitates the declaratory relief here sought by petitioners" (id. 20). These are attempts to bring this case within *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194 *et seq.*, for alleged failure of an administrative agency to exercise discretion conferred upon it. However, the pleaded issue (see note 10 *supra*) and the burden of petitioners' argument here (see note 11 *supra*) are otherwise.

of the Administrative Procedure Act preserves administrative finality in the situation here presented it is unnecessary to determine whether the Act does not also do the same under another clause. Certainly there is no reason why this Court should grant certiorari, in the circumstances of this case, for the determination of that purely academic question.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

August 11, 1948

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Counsel for Respondent
Brotherhood of Engineers.

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 150

J. W. KIRKLAND, ET AL., PETITIONERS

v.

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR NATIONAL MEDIATION BOARD AND FRANK P. DOUGLASS IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 17-18) is reported in 167 F. 2d 529. The District Court of the United States for the District of Columbia rendered no opinion in support of its decree dismissing petitioners' bill of complaint (R. 16).

JURISDICTION

The judgment of the Court of Appeals was entered April 19, 1948 (R. 19). The petition for writ of certiorari was filed July 12, 1948. The jurisdiction of this Court is invoked under Section 240 of the Judicial Code (28 U. S. C. 347).

QUESTION PRESENTED

Whether the district court has jurisdiction to review a certification of collective bargaining representatives made by the National Mediation Board under Section 2, Ninth of the Railway Labor Act.

STATUTES INVOLVED

Section 2, Ninth of the Railway Labor Act, 44 Stat. 577, amended by the Act of June 21, 1934, 48 Stat. 1185, 1188, 45 U. S. C. 152, provides:

> Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative

of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 243, 5 U. S. C. 1009, provides so far as pertinent:

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant

statute, shall be entitled to judicial review thereof.

STATEMENT

Petitioners, 76 of the approximately 95 locomotive engineers of the Western Division of the Atlantic Coast Line Railroad Company, filed a complaint in the District Court for the District of Columbia for a declaratory judgment against Atlantic Coast Line, the Grand International Brotherhood of Locomotive Engineers, the National Mediation Board, and Frank P. Douglass, its chairman (R. 2-10). The complaint alleged the following:

The railroad property now comprising the Western Division of Atlantic Coast Line was from 1926 to January 1, 1946, the property of the Atlanta, Birmingham and Coast Railroad Company, a separate corporate entity whose common shares were held by Atlantic Coast Line. Before and during this period, the engineers employed on the property were represented by the Brotherhood of Locomotive Firemen and Engineers. Atlantic Coast Line acquired the property of its subsidiary on January 1, 1946, and thereafter the respondent Brotherhood of Locomotive Engineers requested the Board to investigate a dispute among the engineers of the Atlantic Coast Line as to who were their representatives. The purpose of this request was to bring about an election participated in by all engineers of the Atlantic Coast Line, the result of which was a foregone conclusion since Western

Division engineers were greatly outnumbered by other engineers of the Atlantic Coast Line. (R. 4-7)

The Board, proceeding on a construction that the Railway Labor Act required carrier-wide bargaining units, held an election participated in by all engineers of the railroad, and certified the respondent Brotherhood, previously the representative of engineers other than those employed on the Western Division, as the representative of all engineers employed by the Atlantic Coast Line (R. 7-8). If this certification is permitted to take effect, petitioners will be deprived of long-standing rights to bargain collectively through representatives of their own choosing, and may lose important benefits and rights arising from the previous maintenance of seniority rosters exclusively for engineers of the Western Division (R. 5-6, 9).

Based on these allegations, petitioners asked that the court declare (1) that the Board erred in deciding that the Railway Labor Act requires organization of a craft of employees on a carrier-wide basis and (2) that the Board was without jurisdiction to hold the election and to certify respondent Brotherhood as petitioners' representative (R. 10).

Motions to dismiss for lack of jurisdiction and for failure to state a cause of action, filed by respondent Brotherhood (R. 14-15) and by respond-

ents National Mediation Board and Frank P. Douglass (R. 15), were granted by the District Court and the complaint was dismissed with prejudice (R. 16). The Court of Appeals affirmed the dismissal in a *per curiam* opinion, holding that the certification of bargaining representatives by the Board under Section 2, Ninth of the Railway Labor Act is not subject to judicial review (R. 17-18).

ARGUMENT

This Court held in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297, that courts lack jurisdiction to review the Mediation Board's certifications of bargaining representatives under Section 2, Ninth of the Railway Labor Act. Petitioners concede that this holding is dispositive of the present case unless a different answer is required by Section 10 of the Administrative Procedure Act, granting judicial review to persons suffering legal wrong from administrative agency actions "except so far as statutes preclude judicial review or agency action is by law committed to agency discretion." We submit that the language of this provision, and its legislative history, convincingly demonstrate that Congress had before it the question whether the holding of *Switchmen's Union* was to be overturned by the Administrative Procedure Act, and answered it in the negative.

The Act, as originally introduced in both Senate and House, provided in Section 10 for judicial re-

view of agency action "except so far as statutes *expressly* preclude judicial review—" (Italics added) (S. 7, H. R. 1203, 79th Cong., 1st Sess.). Had Section 10 been enacted in this form, it would be hard to contend that the rule of the *Switchmen's* case had not been overruled. The Senate Judiciary Committee, to which S. 7 was referred, issued a preliminary print of the bill in which the word "expressly" was deleted, without specific explanation of the deletion, but with the general observation that the pertinent clause of Section 10 was intended to "state the two present general or basic situations in which judicial review is precluded."[1] The significance of the deletion, and the manner in which it is controlling of the present inquiry, is apparent from the Attorney General's comments on the bill subsequently submitted to the Chairmen of both Judiciary Committees. The Attorney General said: (History, pp. 229, 230, 413):

> Section 10: This section, in general, declares the existing law concerning judicial review. It provides for judicial review except insofar as statutes preclude it, or insofar as agency action is by law committed to agency discretion. A statute may in terms preclude judicial review or be interpreted as manifesting a congressional intention to preclude judicial review. Examples of such interpretation

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[1] "Administrative Procedure Act; Legislative History," S. Doc. 248, 79th Cong., 2nd Sess., p. 36. We shall hereafter refer to this compilation as "History."

are: *Switchmen's Union of North America* v. *National Mediation Board* (320 U. S. 297);
* * *

The Attorney General's comments were attached as an appendix to the report of the Senate Committee on the Judiciary (S. Rep. 752, 79th Cong., 1st Sess. (History, 191, 223)). This was the only specific reference to the *Switchmen's* doctrine during the legislative history of the Act. It is significant, however, inasmuch as the Senate Committee report was before both Houses of Congress when they debated and passed the statute. In the absence of any indications to the contrary, the Attorney General's interpretative comments, incorporated in the report of the Senate Committee and referred to in the report of the House Committee (H. Rep. 1980, 79th Cong., 2d Sess. (History, 249)), must be taken to represent the understanding of the committees that considered the legislation. *American Stevedores* v. *Porello,* 330 U. S. 446, 452.[2]

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[2] The extracts quoted by petitioners from the legislative history (Pet. 8-9, Br. 31-32, 35, 37-39, 43-46), do not contradict the Attorney General's construction of Section 10. They are general statements to the effect that the Administrative Procedure Act is designed to provide a most comprehensive judicial review of agency action, that there are but few instances where review is withheld, and the like. Moreover, when petitioners quote from Senator McCarran's remarks on the floor of the Senate (Br. 43-44), they overlook the fact that immediately prior to making the statement upon which they rely the Senator said that the bill would not interfere with any statute "denying a review" because the Senate Judiciary Committee was "not setting ourselves up to abro-

Congress gave further explicit evidence that Section 10 of the Administrative Procedure Act was not intended to alter existing law as to judicial review of certification proceedings in representation cases. The Senate Judiciary Committee Print of June 1945 refuted an objection that the language of the bill might provide for judicial review of certification proceedings by the National Labor Relations Board in representation cases. It noted that this question had not yet been authoratively determined, and declined to prejudge the question by specifically excepting certification proceedings from review.[3] (History, p. 38). Here again Congress gave express evidence of its intention that the questions of reviewability of particular agency actions would be dependent upon the particular statutes involved, as construed by decisions of this Court.

Petitioners' assertions that this Court's decision in the *Switchmen's* case was brought to the attention of the Congress (particularly the Senate) during the debates on the administrative procedure bill, with the comment that Section 10 was intended to overrule that decision (Pet. 9, Br. 44-46), are entirely incorrect. In fact, the *Switchmen's*

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gate acts of Congress." History, p. 311. For further remarks in the course of debate in both Houses recognizing that Section 10 was declaratory of existing law, see History, pp. 319, 323, 326, 374-375, 384.

[3] This history provides a complete answer to petitioners' efforts to draw support from the fact that certifications of employee representatives are specifically excepted from Section 5 of the Act, but not from Section 10.

case was not referred to during the debate in either House. The cases referred to in the discussion between Senators Austin and McCarran relate only to the question of who has standing to obtain judicial review. (History, pp. 310-311). As a result, nothing in the legislative history contradicts the Attorney General's statement that under Section 10 it is still the duty of the courts, where a particular statute is silent as to judicial review, to determine from the context, as in the *Switchmen's* and other cases, whether such review is consistent with and will further the purpose of Congress.

This decision of the court below is consistent with the general pattern of Section 10. That section on its face is a general restatement of the principles of judicial review as evolved by Congress and the courts over many years. It does not purport to answer all of the detailed and often difficult questions that arise as to what is reviewable and by whom, when, and in what court. Those complexities, which have often been alluded to by this Court, e.g. *Stark* v. *Wickard,* 321 U. S. 288, 306, 312, were well known to the draftsmen of the Administrative Procedure Act. The Act was drafted largely by representatives of the American Bar Association working with representatives of the Department of Justice under the supervision of the Judiciary Committees. The Attorney General's uncontradicted views as to the meaning of

Section 10 in relation to the rule of the *Switchmen's* case have been referred to above. In a similar but more general vein, Mr. Carl McFarland, Chairman of the American Bar Association's Special Committee on Administrative Law, testified before the House Committee on the Judiciary, as follows (History, pp. 83-84):

> But any provision for review will be disappointing to many people. We think there must be a section on judicial review within the statute; we think it will be very helpful; we think it will simplify the subject to the extent of indicating to the lawyer or businessman or farmer or laborer who may be involved that his rights of review are of such and such a kind; but we do not believe the principle of review or the extent of review can or should be greatly altered. We think that the basic exception of administrative discretion should be preserved, must be preserved. We believe that about all the statute should or could do would be to state the form of action, the type of acts that are reviewable in accordance with the present law, the authority of the courts to grant temporary relief so that review may be useful, but that the scope of review should be as it now is.

Such an approach to the subject of judicial review recognizes the inevitable role of the courts in applying the general principles of Section 10 to an infinite variety of situations. Thus, looking to what Congress actually did in contrast to gen-

eralized statements, the dropping of the word "express" from the introductory clause of Section 10 can only mean that Congress expects that in its silence the courts will determine as before whether judicial review of agency action is consonant with the legislative purpose. In fact, this Court, in *Ludecke* v. *Watkins,* decided June 21, 1948, has already so decided, in holding that the Alien Enemy Act of 1798, which is silent as to judicial review, precludes review of enemy alien removal orders. The Court said (slip sheet, p. 3): "As Congress explicitly recognized in the recent Administrative Procedure Act, some statutes "preclude judicial review." * * * Barring questions of interpretation and constitutionality, the Alien Enemy Act of 1798 is such a statute. *Its terms, purpose, and construction leave no doubt.*" (Italics supplied).

Petitioners argue that this Court did not hold in *Switchmen's Union* that Section 2, Ninth of the Railway Labor Act "precluded" judicial review, but merely declined to "infer" a right to review because of factors largely outside the face of the statute. But, contrary to petitioners' contention, the holding of this Court was that the language of the statute, read in the light of its legislative history, disclosed Congressional intention to preclude judicial review and accord finality to administrative action taken under Section 2, Ninth. 320 U. S. at 305-306.

There is no conflict, requiring review by this

Court, between the decision of the court below and that of the Circuit Court of Appeals for the Third Circuit in *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457. The question in the *Trinler* case, whether under the Administrative Procedure Act a statute which expressly provides for administrative finality may be read as not precluding review because of decisions permitting review by way of habeas corpus, is not the question here, whether a statute must forbid review in explicit terms. Indeed, the action of the Third Circuit in looking to judicial decisions and beyond the precise words of the immediate statute to determine whether "statutes preclude judicial review" is obviously consistent with that of the court below in doing the same thing—even though in the one case such use of sources other than the words of the statute to determine its meaning resulted in review, and in the other it did not.[4] Furthermore, a decision interpreting the deportation statutes and this Court's decisions with respect to them as not precluding review can hardly be said to conflict with a decision that the Railway Labor Act, as construed, does preclude review. In any event, on

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[4] The Government is of the view that the deportation statute and the habeas corpus cases, which read together permit a limited review, preclude review otherwise, and that the opening clause of Section 10 of the Procedure Act—"except *so far as* statutes preclude judicial review"—has the effect of preventing review in deportation cases to a greater extent than previously. For this reason the Government thought the *Trinler* opinion erroneous, although review by this Court became impossible because of the abatement of the proceeding.

July 8, 1948, the Third Circuit held that the proceeding had abated, vacated its judgment, and remanded the cause to the District Court for dismissal.

In the instant case the court below made no attempt to determine whether the Administrative Procedure Act generally broadens or changes the scope of review of agency action (R. 18). It decided only that under Section 2, Ninth of the Railway Labor Act, Congress has precluded review of the agency action involved, so that Section 10 of the Administrative Procedure Act, by its terms, is inapplicable to such action.

CONCLUSION

The decision below is correct. There is no conflict among decisions of the Circuit Courts of Appeals, and no question requiring review by this Court is presented. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST 1948.

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